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I. INTRODUCTION

Imagine facing the prospect of losing your home. Adding to your anxiety, the mysterious entity claiming the right to foreclose on your home is one that you have never heard of, and one that you have never even borrowed money from.[1] In fact, your original lender no longer has anything to do with the loan secured by your home.[2] You want answers. You want to know who to talk to. But the information you seek is not in the public record. Instead, it is either not recorded at all, or it is in the

1. *See* Mike McIntire, *Murky Middleman: Tracking Loans Through a Firm That Holds Millions*, N.Y. TIMES, Apr. 24, 2009, at B1.

2. *See id.*; *see also* Robert E. Dordan, Comment, *Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for a Peaceful Existence*, 12 LOY. J. PUB. INT. L. 177, 177 (2010) ("While borrowers may have been familiar with the company that was servicing their mortgage loan or the bank where the loan originated, they are often surprised to find that their mortgages are actually listed in the name of MERS, and in many cases, that MERS may be filing a lawsuit in its own name to foreclose on a borrower's home."). Mortgage Electronic Registration Systems (MERS) is a "confidential computer registry for trading mortgage loans" that was "[c]reated by lenders seeking to save millions of dollars on paperwork and public recording fees every time a loan changes hands." McIntire, *supra* note 1. See *infra* Part IV for more information on the controversy surrounding MERS.

private records of an entity known as Mortgage Electronic Registration Systems (MERS), a private mortgage tracking system some claim was designed by banks to confuse consumers so reckless lenders may avoid accountability.[3]

A family losing its home to foreclosure faces a frightening state of uncertainty. This uncertainty is even more frightening in California because the state's ambiguous laws provide little protection.[4] In California, many people take possession of their homes by giving creditors a deed of trust.[5] Creditors then often pool these deeds of trust with thousands of

3. McIntire, *supra* note 1 ("To a number of critics, MERS has served to cushion banks from the fallout of their reckless lending practices. 'I'm convinced that part of the scheme here is to exhaust the resources of consumers and their advocates,' said Marie McDonnell, a mortgage analyst in Orleans, Mass., who is a consultant for lawyers suing lenders. 'This system removes transparency over what's happening to these mortgage obligations and sows confusion, which can only benefit the banks.'"). Fortunately, Delaware has recently taken MERS to task in requiring MERS to provide Delaware homeowners access to information about their home loans and requiring lenders using MERS to publicly record any transfers of ownership before foreclosing on a mortgage. *See MERS Reaches Agreement with Delaware AG Biden To Provide Increased Transparency*, NAT'L MORTGAGE PROF. (July 13, 2012, 5:18 PM), http://nationalmortgageprofessional.com/news30382/mers-reaches-agreement-delaware-ag-biden-provide-increased-transparency [hereinafter *MERS Reaches Agreement*]. In the past few months, MERS has begun cooperating by offering access to mortgage information free of charge to homeowners, county officials, and regulatory officials. *See FAQ*, MERS INC., http://www.mersinc.org/about-us/faq (last visited May 7, 2013). Although this is a step in the right direction for homeowner protection, California should follow Delaware's lead or pass legislation to ensure MERS continues to provide homeowners access to accurate information about their home loans. Furthermore, California must account for the deed of trust transfers that occur outside MERS's system.

4. *See infra* Part II.A.

5. Deeds of trust are similar to mortgages in that they secure a loan with real property pledged as collateral in case of default. 27 CAL. JUR. 3D *Deeds of Trust* § 1 (2011). They differ in that mortgages typically empower lenders to sell homes in foreclosure through judicial procedures after borrowers default, whereas foreclosures under deeds of trust allow lenders to engage in nonjudicial foreclosures. *Id.* § 4 (citing Prefumo v. Russell, 83 P. 810 (Cal. 1906)). This is accomplished by way of a three-party contract, with the lender named as the beneficiary of the loan, the borrower named as the trustor, and a trustee that holds "title" to the property until the debt is repaid. *Id.* § 1 (citing Siegel v. Am. Sav. & Loan Ass'n, 258 Cal. Rptr. 746 (Ct. App. 1989); Kerivan v. Title Ins. & Trust Co., 195 Cal. Rptr. 53 (Ct. App. 1983)). If the debt is paid off, title passes back to the borrower. *Id.* Historically, courts interpreted this passage of title under a deed of trust as an actual transfer of ownership in the property under the title theory of mortgages. *Id.* But modern courts in California have interpreted deeds of trust under the lien theory of mortgages, such that a deed of trust only creates a lien on the property, and actual ownership remains with the borrower. *Id.* § 4 (citing Monterey S.P. P'ship v. W.L. Bangham, Inc., 777 P.2d 623 (Cal. 1989) (en banc); Bank of It. Nat'l

other loans and sell them to various financial institutions—all unknown to the homeowner.[6] When the homeowner fails to keep up with payments, these entities sell the home out of court in foreclosure.[7] Borrowers are then unable to obtain important information from public records about their home loans, such as who has the authority to foreclose on their home.[8] Other states have statutes that avoid this situation by requiring all transfers of deeds of trust to be publicly recorded prior to a valid foreclosure.[9] Unfortunately, the California Legislature has not updated the foreclosure statutes to give courts guidance and has not statutorily defined the deeds of trust that give lenders and financial institutions the power to sell the homes in nonjudicial foreclosure.[10]

In the years following the collapse of the housing market and the recession of 2008, federal courts saw an unprecedented rise in the amount of home foreclosures on their dockets.[11] Moreover, California saw a

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Trust & Sav. Ass'n v. Bentley, 20 P.2d 940 (Cal. 1933); Secrest v. Sec. Nat'l Mortg. Loan Trust 2002-2, 84 Cal. Rptr. 3d 275 (Ct. App. 2008)).

6. *See infra* Part IV.

7. *See* 27 CAL. JUR. 3D *Deeds of Trust* § 258 (2011). Deeds of trust containing a power of sale clause allow the loan beneficiary to pursue a nonjudicial foreclosure in which the trustee exercises the power of sale to sell the home in foreclosure. *Id.* (citing Nguyen v. Calhoun, 129 Cal. Rptr. 2d 436 (Ct. App. 2003)). Nonjudicial foreclosures are quicker and less expensive than a judicial foreclosure; there is no judicial oversight absent a foreclosure challenge, and the sale is the final adjudication of the rights of the borrower and the lender. *Id.* (citing CAL. CIV. CODE §§ 2924–2924k (West 2012); Royal Thrift & Loan Co. v. Cnty. Escrow, Inc., 20 Cal. Rptr. 3d 37 (Ct. App. 2004)).

8. *See* McIntire, *supra* note 1.

9. *See, e.g.*, OR. REV. STAT. § 86.735 (2011) ("The trustee may foreclose a trust deed by advertisement and sale in the manner provided in ORS 86.740 to 86.755 if: (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated . . . ."); *see also* IDAHO CODE ANN. § 45-1505 (2012) ("Foreclosure of trust deed, when.—The trustee may foreclose a trust deed by advertisement and sale under this act if: (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated . . . .").

10. 4 HARRY D. MILLER & MARVIN B. STARR, CALIFORNIA REAL ESTATE § 10:2 (3d ed. 2012) ("The deed of trust is not a true express trust. While there is a statutory form of mortgage, there is no statutory form of deed of trust. There are no enabling statutes that set forth the form of the deed of trust, its required provisions, or its legal effects. However, the statutes regulating enforcement of deeds of trust implicitly recognize their validity." (footnotes omitted)).

11. John W. Schoen, *Study: 1.2 Million Households Lost to Recession*, MSNBC (April 8, 2010, 9:53 AM), http://www.msnbc.msn.com/id/36231884/ns/business-eye_on_the_economy/t/study-million-households-lost-recession/ ("Brown represents one of the more than 1.2 million households lost to the recession . . . between 2005 and 2008. That number doesn't include information from 2009, when job losses and foreclosures continued to rise. So it's likely that the full impact of the 8.4 million jobs lost and nearly three million homes foreclosed on since the recession began has taken an even bigger toll . . . . New foreclosures filings are running about 300,000 a month, according to

disproportionately high level of home foreclosures compared to other states.[12] During such a time of uncertainty, one would hope California law would provide guidance on how to address the plentiful foreclosure challenges.[13] Unfortunately, federal courts in California operated with very little guidance, as evidenced by the recent judicial turmoil among federal district and bankruptcy courts in California.[14] The courts could not agree on the interpretation of California Civil Code section 2932.5, the statute requiring that assignments of mortgages be publicly recorded prior to valid foreclosures.[15] This conflict left both borrowers and lenders uncertain as to whether a foreclosure under a deed of trust is valid when

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RealtyTrac. There are currently some 5 million homeowners that are 90 days or more past due on their mortgages . . . .").

12. *See* Les Christie, *California Cities Fill Top 10 Foreclosure List*, CNNMONEY (Aug. 14, 2007, 11:44 AM), http://money.cnn.com/2007/08/14/real_estate/California_cities_lead_foreclosure/index.htm. California's foreclosure woes were disproportionate to many other states even before the recession aggravated the situation. *Id.*

13. David R. Greenberg, Comment, *Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures*, 83 TEMP. L. REV. 253, 253 (2010) ("8.1 million homes—or sixteen percent of all mortgages—are expected to be in foreclosure. . . . [F]oreclosure problems first appeared in the courts, but have since garnered national attention as a result of the widespread use of questionable evidence to establish the elements of a foreclosure." (footnote omitted)).

14. Between 2010 and 2011, a multitude of decisions came out of the district courts in California holding that section 2932.5 of the California Civil Code—the statute that requires the public recording of a mortgage transfer before a valid foreclosure—applies only to mortgages. *See, e.g.*, Estillore v. Countrywide Bank FSB, No. CV F 10 1243 LJO GSA, 2011 WL 348832, at *15 (E.D. Cal. Feb. 2, 2011); Jacobs v. Bank of Am., N.A., No. C10 04596 HRL, 2011 WL 250423, at *5 (N.D. Cal. Jan. 25, 2011); Park v. Wachovia Mortg., FSB, No. 10cv1547 WQH RBB, 2011 WL 98408, at *8–9 (S.D. Cal. Jan. 12, 2011); Washington v. Nat'l City Mortg. Co, No. C 10 5042 SBA, 2010 WL 5211506, at *4 (N.D. Cal. Dec. 16, 2010); Caballero v. Bank of Am., No. 10 CV 02973 LHK, 2010 WL 4604031, at *3 (N.D. Cal. Nov. 4, 2010); Selby v. Bank of Am., Inc., No. 09cv2079 BTM(JMA), 2010 WL 4347629, at *3 (S.D. Cal. Oct. 27, 2010); Parcray v. Shea Mortg., Inc., No. CV-F-09-1942 OWW/GSA, 2010 WL 1659369, at *12 (E.D. Cal. Apr. 23, 2010); Roque v. Suntrust Mortg., Inc., No. C 09 00040 RMW, 2010 WL 546896, at *3 (N.D. Cal. Feb. 10, 2010). Despite these holdings, at least one bankruptcy court in California held that section 2932.5 also applies to deeds of trust and invalidated foreclosures that fail to follow the statute's recording requirements. *See In re* Salazar, 448 B.R. 814, 822 (Bankr. S.D. Cal. 2011), *rev'd*, 470 B.R. 557 (S.D. Cal. 2012).

15. CAL. CIV. CODE § 2932.5 (West 2012) ("Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded.").

the assignment of the deed of trust to another beneficiary was not publicly recorded.[16]

A superficial reading of section 2932.5 leads one to believe that it applies only to mortgages, a reading that would render section 2932.5 nearly obsolete given that deeds of trust have replaced mortgages as the preferred device for granting creditors security interests in borrowers' properties.[17] But in California, courts interpret deeds of trust as mere mortgages with a power of sale—encumbrances that only grant a lien on the property.[18] Furthermore, there is little California common law providing guidance to courts facing challenges to the validity of home foreclosures based on section 2932.5.[19] Undoubtedly, section 2932.5 requires that the assignment of a mortgage be recorded for a valid foreclosure.[20] But some courts have held foreclosures under a deed of trust are valid when the assignment to another beneficiary is not recorded,[21] while others have

16. *See supra* note 14 and accompanying text. The uncertainty about the validity of foreclosures is not limited to homeowners, but also affects lenders who may see their loans go unpaid due to the nebulous nature of the laws governing deeds of trust. Amir Efrati, *Foreclosure Challenges Raise Questions About Judicial Role*, WALL ST. J., Dec. 24, 2009, at A15. In fact, the rise in foreclosures has led to a rise in what some believe is judicial activism to alleviate the harsh consequences to homeowners as a result of the housing market collapse, with some judges finding ways to invalidate foreclosures. *Id.*

17. *See* Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815, 821 (Ct. App. 2011); *see also* MILLER & STARR, *supra* note 10, § 10.1 ("The use of a conveyance to a trustee clothed with a power of sale offered the creditor several advantages over the mortgage so that, by the time the distinctions between the two security instruments were removed during the early part of the 20th century, the deed of trust had become the generally accepted and preferred security device in California.").

18. *See* Domarad v. Fisher & Burke, Inc., 76 Cal. Rptr. 529, 535 (Ct. App. 1969) (citing MacLeod v. Moran, 94 P. 604, 605 (Cal. 1908)). *See also* MILLER & STARR, *supra* note 10, § 10.2 ("For trust deeds, courts generally arrive at the same conclusion as the 'lien theory' traditionally applicable to the mortgage. In practical effect, if not in legal parlance, a deed of trust is a lien on the property. The trustee has only nominal title. Although technically title passes to the trustee under the deed of trust, the trustee only has title to the extent necessary for the execution of the trust, and title to the property must be reconveyed to the trustor on payment of the obligation. The reconveyance is nothing more than a release of the lien of the deed of trust. Legal title passes to the trustee solely for the purpose of securing the performance of the obligation, and the trustee receives only such title as is necessary for the execution of its trust." (footnotes omitted)).

19. *See Calvo*, 130 Cal. Rptr. 3d at 819 ("After 1908, only the federal courts have addressed the question whether section 2932.5 applies to deeds of trust, and only very recently.").

20. *See* CAL. CIV. CODE § 2932.5.

21. *See* Estillore v. Countrywide Bank FSB, No. CV F 10 1243 LJO GSA, 2011 WL 348832, at *15 (E.D. Cal. Feb. 2, 2011) ("California's non-judicial foreclosure statutes do not require a recording of assignments of interests in deeds of trust prior to foreclosure."); Jacobs v. Bank of Am., N.A., No. C10 04596 HRL, 2011 WL 250423, at *5 (N.D. Cal. Jan. 25, 2011) ("Non-judicial foreclosures are governed exclusively by California Civil Code section 2924-2924i."); Park v. Wachovia Mortg., No. 10cv1547 WQH RBB, 2011 WL 98408, at *8–9 (S.D. Cal. Jan. 12, 2011) (holding that section

held they are invalid for violating the statute.[22] The language of the California Civil Code provides little clarity.[23]

Because California courts hold that deeds of trust are practically only mortgages with a power of sale in that they only place a lien on the property, the same rules that apply to mortgages should apply to deeds of trust.[24] In order to provide the public sufficient notice about the chain of ownership and to provide notice to the borrower on who has the power to foreclose under a deed of trust, the assignment of a deed of trust should be recorded for a valid foreclosure.[25] The California Legislature should

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2932.5 applies to mortgages, not deeds of trust); Washington v. Nat'l City Mortg. Co, No. C 10 5042 SBA, 2010 WL 5211506, at *4 (N.D. Cal. Dec. 16, 2010) (holding that section 2932.5 does not apply to deeds of trust); Selby v. Bank of Am., Inc., No. 09cv2079 BTM(JMA), 2010 WL 4347629, at *3 (S.D. Cal. Oct. 27, 2010) (holding that section 2932.5 does not apply to deeds of trust); Parcray v. Shea Mortg., Inc., No. CV-F-09-1942 OWW/GSA, 2010 WL 1659369, at *11 (E.D. Cal. Apr. 23, 2010) ("There is no requirement under California law for an assignment to be recorded in order for an assignee beneficiary to foreclose.").

22. *See In re* Salazar, 448 B.R. 814, 820 (Bankr. S.D. Cal. 2011) (holding a foreclosure under a deed of trust invalid for failure to comply with section 2932.5), *rev'd*, 470 B.R. 557 (S.D. Cal. 2012); *see also* Tamburri v. Suntrust Mortg., Inc., No. C 11 2899 EMC, 2011 WL 2654093, at *5 (N.D. Cal. July 6, 2011) (holding that failure to comply with section 2932.5 raised serious questions about the validity of a foreclosure under a deed of trust).

23. Adding to the confusion, the language of section 2920(b) appears to exclude deeds of trust from the statutory rules governing mortgages in section 2924, while on the contrary the provisions within section 2924 expressly refer to deeds of trust. *See infra* Section II.B.

24. Monterey S.P. P'ship v. W.L. Bangham, Inc., 777 P.2d 623, 626 (Cal. 1989) (en banc) ("In practical effect, if not in legal parlance, a deed of trust is a lien on the property."); *accord* Aviel v. Ng, 74 Cal. Rptr. 3d 200, 205 (Ct. App. 2008) (citing Bank of It. Nat'l Trust & Sav. Ass'n v. Bentley, 20 P.2d 940, 945 (Cal. 1933)).

25. Although the California Legislature has not clearly stated that transfers of deeds of trust need to be recorded, secondary sources in California indicate that the recordings involving assignments of monetary encumbrances are required for valid foreclosures. *See, e.g.*, MILLER & STARR, *supra* note 10, § 10:39. As recently as last year, Miller and Starr's treatise was clear in stating that "[i]n the case of a deed of trust or mortgage with a power of sale, an assignee can only enforce the power of sale if the assignment is recorded, because the assignee's authority to conduct the sale must appear in the public records." *Id.* The language has since been replaced with the following:

> In the case of a monetary encumbrance with a power of sale, an assignee can only enforce the power of sale if the assignment is recorded, because the assignee's authority to conduct the sale must appear in the public records, although three reported decisions now hold that this requirement applies only to the assignment of the mortgagee's interest in a mortgage but not to the amount of the *beneficiary's* interest in a deed of trust containing a power of sale, because the power to sell the property in such cases is held by the trustee of record rather than the beneficiary.

recognize these policy concerns and provide clarity to outdated foreclosure statutes by revising California Civil Code section 2932.5 to reflect the changes that occurred over nearly a century in how California courts have interpreted deeds of trust.[26] The California Legislature should also conduct a study on the validity of private recording systems and consider whether such systems would meet the legislature's requirements as a viable alternative to public recording.

Part II of this Comment introduces how deeds of trust were developed to allow the lender to avoid the judicial process by engaging in a nonjudicial foreclosure. This Part also explains that the confusion in the courts arose because deeds of trust are not defined in the statutes that govern them. Part III describes the early understanding of deeds of trust in California common law under the title theory and how California courts have increasingly rejected the title theory in favor of the lien theory. Part IV introduces the rise of a private alternative to public recording of assignments of deeds of trust and how this created problems in states that have statutes requiring the public recording of assignments for valid foreclosures. Part V discusses the controversy that arose among the federal courts in California due to the ambiguous nature of deeds of trust in California's statutes and common law and how courts have reacted to the private recording system introduced in Part IV.

Part VI discusses solutions to the conflict, focusing on the statutory schemes of numerous states that avoid the problem of ambiguity regarding deeds of trust in California, and discussing how the private system of

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Id. (4 Supp. 2012-2013). Miller and Starr's revision is undoubtedly in reaction to the recent California appellate court decisions in *Herrera v. Federal National Mortgage Ass'n*, 141 Cal. Rptr. 3d 326 (Ct. App. 2012), and *Calvo v. HSBC Bank USA, N.A.*, 130 Cal. Rptr. 3d 815 (Ct. App. 2011). Note that the treatise authors state that the assignment of a monetary encumbrance with a power of sale—not just mortgages—should be publicly recorded, but they qualify this assertion with reference to the recent California decisions that have held this rule does not apply to deeds of trust. MILLER & STARR, *supra note* 10, § 10:39 (4 Supp. 2012-2013). The treatise authors' reference to monetary encumbrances with a power of sale, where they could have simply used the term *mortgage*, implies that these recent decisions are off track because a deed of trust is a monetary encumbrance with a power of sale, not a transfer of title. *See* MILLER & STARR, supra note 10, § 10:39; *supra* note 18 and accompanying text. When one pays particular attention to Miller and Starr's explanation that *Herrera* and *Calvo* followed the "ancient decision" in *Stockwell v. Barnum*, 94 P. 400 (Cal. 1908), the treatise authors' skepticism of these recent California decisions becomes almost palpable. MILLER & STARR, *supra* note 10, § 10:39 (4 Supp. 2012-2013). This Comment will demonstrate that these recent decisions erred because they followed an "ancient decision" that applied an understanding of deeds of trust that has long since been abandoned—the obsolete understanding that deeds of trust transfer actual title that has been rejected by the California Supreme Court and numerous California appellate court decisions. *See infra* Part III.

26. *See infra* Part III.A.

recording could avoid the controversy by allowing easy public access to its records of assignments. Finally, this Comment concludes that, due to the drawbacks of other solutions, the California Legislature must revise the foreclosure statutes—particularly section 2932.5—to create a balanced and comprehensible foreclosure system that would protect the interests of both borrowers and lenders.

II. INTRODUCTION TO MORTGAGES AND DEEDS OF TRUST IN CALIFORNIA

Under the California Civil Code, a mortgage is a contract that creates a lien—an encumbrance or liability on a property as security for the performance of a debt.[27] Unlike deeds of trust, mortgages are statutorily defined instruments in the California Civil Code.[28] Rather than conveying title to the mortgagee, the mortgage is a security device that empowers the mortgagee to initiate a judicial foreclosure on the property upon breach of the contract to pay the debt.[29] Courts of equity developed doctrines, such as the equity of redemption, to alleviate the harsh effect on mortgagors when they failed to fulfill their debts.[30] The equity of redemption allowed the defaulting debtor to recover his or her property by paying the debt prior to the foreclosure sale of the property.[31] Because creditors were—and to this day in the case of mortgages still are—

27. CAL. CIV. CODE § 2920 (West 2012) ("(a) A mortgage is a contract by which specific property, including an estate for years in real property, is hypothecated for the performance of an act, without the necessity of a change of possession. (b) For purposes of Sections 2924 to 2924h, inclusive, 'mortgage' also means any security device or instrument, other than a deed of trust, that confers a power of sale affecting real property or an estate for years therein, to be exercised after breach of the obligation so secured, including a real property sales contract, as defined in Section 2985, which contains such a provision.").

28. MILLER & STARR, *supra* note 10, § 10:2 ("The deed of trust is not a true express trust. While there is a statutory form of mortgage, there is no statutory form of deed of trust. There are no enabling statutes that set forth the form of the deed of trust, its required provisions, or its legal effects. However, the statutes regulating enforcement of deeds of trust implicitly recognize their validity." (footnotes omitted)).

29. *Id.*; 44 CAL. JUR. 3D *Mortgages* § 1 (2011) ("The code defines a mortgage as a contract by which specific property . . . is hypothecated for the performance of an act, without the necessity of a change of possession. Thus, a mortgage is merely a written contract hypothecating specific property and creating a lien for the security of a debt." (citing CAL. CIV. CODE § 2920(a))); *id.* § 3.

30. *See* MILLER & STARR, *supra* note 10, § 10:1 (citing CAL. CIV. CODE § 2903 (West 2012)).

31. *Id.*

restricted in their remedies for default, they had to rely on the courts to enforce their security rights in the defaulting debtor's property via judicial foreclosure.[32] Forcing lenders to rely on the courts to enforce borrowers' obligations led to the development of the deed of trust, a device that originally purported to transfer actual title to the homeowner's property to a trustee until the borrower paid off the loan.[33]

A. Historical Understandings and Development of Deeds of Trust

During the 1800s, the deed of trust was developed to avoid the procedural restrictions creditors faced when trying to enforce a foreclosure under a mortgage.[34] With a deed of trust, the borrower would convey actual title and the right to sell the property to the trustee for the benefit of a lender and beneficiary in the case of default.[35] This arrangement avoided the necessity of engaging the courts to initiate a foreclosure sale of the property upon default.[36] Instead, lenders could engage in a nonjudicial foreclosure and sale of the property.[37] Since the twentieth century, the deed of trust has become the preferred security device in California.[38] Like mortgages, deeds of trust may be transferred or assigned, but the confusion arises because deeds of trust are not statutorily defined, leaving the courts to determine which statutes apply to deeds of trust when many of them only mention mortgages.[39]

B. A Cause for Confusion: The Statutes That Govern Security Devices in California Do Not Define Deeds of Trust

Deeds of trust have overtaken mortgages as the preferred security device for real property in California, but it has been up to the courts to interpret a century of common law to determine which sections of the

32. 44 CAL. JUR. 3D *Mortgages* § 3 (citing Beatty v. Clark, 20 Cal. 11 (1862)).
33. *See* MILLER & STARR, *supra* note 10, § 10:1.
34. *Id.*
35. Aviel v. Ng, 74 Cal. Rptr. 3d 200, 205 (Ct. App. 2008) ("There are three parties to a deed of trust: (1) the trustor, who owns the property that is conveyed to (2) the trustee as security for the obligation owed to (3) the beneficiary." (footnotes omitted)).
36. MILLER & STARR, *supra* note 10, § 10:1.
37. *Id.*
38. *Id.* ("The use of a conveyance to a trustee clothed with a power of sale offered the creditor several advantages over the mortgage so that, by the time the distinctions between the two security instruments were removed during the early part of the 20th century, the deed of trust had become the generally accepted and preferred security device in California.").
39. *Id.* § 10:2; *see also* Bank of It. Nat'l Trust & Sav. Ass'n v. Bentley, 20 P.2d 940, 945 (Cal. 1933) (holding that a statute that mentioned only mortgages also applied to deeds of trust).

mortgage statutes should apply to deeds of trust.[40] The fact that mortgages have fallen out of use compared to deeds of trust should justify revising the California Civil Code's sections that govern mortgages and foreclosures.[41] Section 2920 furthers the confusion by stating:

> (a) A mortgage is a contract by which specific property, including an estate for years in real property, is hypothecated for the performance of an act, without the necessity of a change of possession.
>
> (b) For purposes of Sections 2924 to 2924h, inclusive, "*mortgage" also means any security device or instrument, other than a deed of trust*, that confers a power of sale affecting real property or an estate for years therein, to be exercised after breach of the obligation so secured, including a real property sales contract, as defined in Section 2985, which contains such a provision.[42]

Section 2920(a) is a clear definition of mortgage on its own terms. But problems arise with section 2920(b) because it appears to distinguish deeds of trust from mortgages, which are defined in section 2920(a).[43] The definition of a mortgage as "any security device or instrument, other than a deed of trust, that confers the power of sale"[44] after default gives rise to the argument that a deed of trust is not a mere security device to secure repayment, but a change in actual ownership from the borrower to the lender.[45] However, section 2920(a) should be interpreted so that a deed of trust is implicitly defined along with a mortgage as a contract by which property is hypothecated to secure "the performance of an act, without the necessity of a change in possession."[46] Under such an interpretation, it is apparent that the only reason the language "other than a deed of trust" was added to define what a mortgage also means in

40. *See, e.g.*, Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815, 821 (Ct. App. 2011).

41. Oregon, for example, explicitly defines deeds of trust as mortgages and subject to all the laws that govern mortgages except to the extent they contradict the statutes that govern deeds of trust. OR. REV. STAT. § 86.715 (2011).

42. CAL. CIV. CODE § 2920 (West 2012) (emphasis added).

43. *Id.* § 2920(b).

44. *Id.*

45. *See* Pedersen v. Greenpoint Mortg. Funding, Inc., CIV No. S-11-0642 KJM EFB, 2011 WL 3818560, at *18 (E.D. Cal. Aug. 29, 2011).

46. CAL. CIV. CODE § 2920(a); *see* 58 CAL. JUR. 3D *Statutes* § 118 (2012) ("When two statutes touch upon a common subject, they are to be construed in reference to each other so as to harmonize the two in such a way that no part of either becomes surplusage." (citing Johnson v. Arvin-Edison Water Storage Dist., 95 Cal. Rptr. 3d 53 (Ct. App. 2009))).

section 2920(b) is that deeds of trust were already defined in section 2920(a).[47]

Although deeds of trust are distinguished from what a mortgage "also means" in section 2920(b),[48] the question remains what a deed of trust is if it is not defined by section 2920. Section 2920(b) indicates that a mortgage also means a security device to secure repayment, but does not mean a deed of trust for the purposes of sections 2924 through 2924(h) inclusive.[49] This does not mean that a mortgage is always to be distinguished from a deed of trust, even though section 2920(b)'s language seems to imply that sections 2924 through 2924(h) govern mortgages and not deeds of trust.[50] In fact, sections 2924 through 2924(h) explicitly refer to and govern deeds of trust in addition to mortgages.[51] Furthermore, although deeds of trust are not defined in the code, they fall under the overarching heading "Mortgages" in the governing sections of the California Civil Code.[52] Therefore, section 2920(b) is not distinguishing mortgages from deeds of trust—it would be superfluous to construe

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47. *See* 58 CAL. JUR. 3D *Statutes* § 118 (describing how courts should harmonize the portions of a statutory scheme to give effect to each portion).

48. CAL. CIV. CODE § 2920(b).

49. *Id.* In fact, courts in California hold that there is little difference between mortgages and deeds of trust, and generally apply the same rules to mortgages and deeds of trust. *See, e.g.*, Domarad v. Fisher & Burke, Inc., 76 Cal. Rptr. 529, 535 (Ct. App. 1969) ("[I]n California there is little practical difference between mortgages and deeds of trust[,] . . . they perform the same basic function, and . . . a deed of trust is 'practically and substantially only a mortgage with power of sale.' . . . [A]lthough 'there are no statutory provisions dictating the form or stating the effect of deeds of trust,' deeds of trust are analogized to mortgages and the same rules are generally applied to deeds of trust that are applied to mortgages." (citations omitted)).

50. *See supra* notes 42–43 and accompanying text.

51. For example, section 2924(a)(1)(A) reads:

> (1) The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default. That notice of default shall include all of the following:
> (A) A statement identifying the mortgage or *deed of trust* by stating the name or names of the trustor or trustors and giving the book and page, or instrument number, if applicable, where the mortgage or deed of trust is recorded or a description of the mortgaged or trust property.

CAL. CIV. CODE § 2924(a)(1)(A) (West 2012) (emphasis added).

52. CAL. CIV. CODE Analysis div. 3, pt. 4, tit. 14, ch. 2 (West 2007). Additionally, section 2932.5 was not originally included in the provisions under the "Mortgages" heading; it was originally under the heading "Uses and Trusts," a section that has since been repealed. Section 2932.5 was originally section 858 but "succeeded to § 858 verbatim as part of the 1986 technical revisions to California trust law." *In re* Cruz, 457 B.R. 806, 815 (Bankr. S.D. Cal. 2011) (citing *Recommendation Proposing the Trust Law*, 18 CAL. L. REVISION COMMISSION REP. 1207, 1483 (1986); *Conforming Revisions*, 18 CAL. L. REVISION COMMISSION REP. 753, 764 (1985)). The *Cruz* court found that this legislative history supported its finding that section 2932.5 applied to both deeds of trust and mortgages. *Id.*

mortgages in section 2920(b) to "also mean" deeds of trust because deeds of trust should already be covered by the definition of mortgages in section 2920(a).[53]

III. CHANGING INTERPRETATION OF DEEDS OF TRUST: CALIFORNIA EMBRACES THE LIEN THEORY OVER THE TITLE THEORY

Early court cases followed the title theory of mortgages, but modern courts tend to follow the lien theory.[54] Under the title theory of mortgages, a mortgage conveys actual title, or legal estate, to a mortgagee.[55] The original title owner's ownership in the property is severed until the loan is paid off and the property is conveyed back to the borrower.[56] But under the lien theory, a mortgage does not separate title from the original title owner; it simply places a lien on the property.[57] The original title owner retains ownership in the property until a purchaser obtains the deed in a foreclosure sale after the borrower defaults on the loan.[58]

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53. At the outset, section 2924(a) seems to preclude deeds of trust from the definition of a mortgage: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge." CAL. CIV. CODE § 2924(a) (West 2012). But Miller and Starr explain that the "statutes exclude a transfer in trust from the definition of a mortgage, but this exception only refers to an express trust. . . . The deed of trust is not a true express trust." MILLER & STARR, *supra* note 10, § 10:2 (footnotes omitted). They go on to explain that deeds of trust are "anomal[ies]" with "none of the incidents of a normal trust," and that since they "began to replace mortgages as the primary real property security device, it was recognized that trust deeds are not true trusts but are practically and substantially only mortgages with power of sale." *Id.* (footnotes omitted).

54. *See, e.g.*, Harms v. Sprague, 473 N.E.2d 930, 932–34 (Ill. 1984) (adhering to the lien theory of mortgages and rejecting early cases that held that a joint tenancy was severed by a mortgage because the mortgage conveyed actual title to the property to the mortgagee).

55. *Id.* at 933.

56. *Id.*

57. *Id.* ("Clearly, this court adheres to the rule that a lien on a joint tenant's interest in property will not effectuate a severance of the joint tenancy, absent the conveyance by a deed following the expiration of a redemption period.").

58. *Id.* at 933–34 ("In Illinois the giving of a mortgage is not a separation of title, for the holder of the mortgage takes only a lien thereunder. After foreclosure of a mortgage and until delivery of the master's deed under the foreclosure sale, purchaser acquires no title to the land either legal or equitable. Title to land sold under mortgage foreclosure remains in the mortgagor or his grantee until the expiration of the redemption period and conveyance by the master's deed." (quoting Kling v. Ghilarducci, 121 N.E.2d 752, 756 (Ill. 1954)) (internal quotation marks omitted)).

A. California Case Law: Recognizing a Departure from the Title Theory of Deeds of Trust

Early on, California courts recognized deeds of trust as actual conveyance of title to the property to the creditor or trustee.[59] The debtor functionally and legally granted title to the property to the trustee and retained only a power of redemption upon paying off the debt secured by the note.[60] The authoritative case distinguishing deeds of trust from mortgages under the title theory was *Stockwell v. Barnum*.[61] In *Stockwell*, the court held that a deed of trust differed from a mortgage in that it actually passed legal title to the property to the trustee, including the power to sell the property in foreclosure without the necessity of initiating a judicial foreclosure.[62] Because legal title actually passed to the trustee, the deed of trust was not considered an encumbrance, and it was unnecessary to record the assignment of a deed of trust for the foreclosure to be valid.[63]

According to the California courts in the early twentieth century, there was no confusion regarding the state of the law pertaining to deeds of trust—the assignment of a deed of trust did not have to be recorded for a valid foreclosure.[64] In *Bank of Italy National Trust & Savings Ass'n v. Bentley*, the California Supreme Court recognized the historical distinction between mortgages under the lien theory and deeds of trust under the title theory.[65] However, the court did so with hesitancy, adding that the law in "nearly every state in the United States" is that deeds of trust create only a lien, and that in an increasing number of cases, including the California Supreme Court's own *MacLeod v. Moran*, California courts were treating mortgages and deeds of trust nearly identically.[66] According to the court, these cases, "although recognizing that 'title' passes in the case of a deed of trust, emphasize the fact that the function and purpose of the two types of security are identical, and, for that reason, apply the same rules to deeds of trust that are applied to mortgages."[67] The court's

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59. Stockwell v. Barnum, 94 P. 400, 402 (Cal. Ct. App. 1908).

60. *Id.* ("[D]eeds of trust . . . instead of creating a lien only, as in the case of a mortgage, pass[] the legal title to the trustee, thus enabling him in executing the trust to transfer to the purchaser a marketable record title. It is immaterial who holds the note.").

61. *Id.*

62. *Id.*

63. *Id.* (applying California Civil Code section 858, the predecessor of section 2932.5).

64. *Id.* ("The transferee of a negotiable promissory note, payment of which is secured by a deed of trust whereby the title to the property and power of sale in case of default is vested in a third party as trustee, is not an [e]ncumbrancer to whom power of sale is given, within the meaning of section 858 of the Civil Code.").

65. Bank of It. Nat'l Trust & Sav. Ass'n v. Bentley, 20 P.2d 940, 944 (Cal. 1933).

66. *Id.* (citing MacLeod v. Moran, 94 P. 604, 605 (Cal. 1908)).

67. *Id.*

rhetorical use of quotation marks around the "title" that passes in a deed of trust and its reference to the nature of deeds of trust in California as "anomalous" indicate that the title theory the court followed in *Stockwell* no longer reflected the true state of the law.[68] The court also stated, without disapproval, that many California decisions held that deeds of trust were "practically and substantially only a mortgage with power of sale."[69] Finally, although *Stockwell* held that a deed of trust was not an encumbrance, the court cited *Hollywood Lumber Co. v. Love*,[70] which held that a deed of trust was an "[e]ncumbrance within the meaning of the mechanics' lien laws," thus further demonstrating that the lien theory of mortgages also applied to deeds of trust.[71]

The *Bank of Italy* court acknowledged that California courts were increasingly applying the lien theory to deeds of trust and treating them as mortgages with a power of sale despite the common law history of following the title theory.[72] But the court did not go so far as to abolish the distinction between deeds of trust and mortgages with a power of sale, as many other states had done.[73] Nor did the court answer the question of whether section 2932.5 applies to deeds of trust as well as mortgages.[74] Instead, the court decided whether a different statute, although only mentioning mortgages, also applied to deeds of trust.[75] The court determined that, although section 726 of the California Code of Civil Procedure only mentioned that the security must be exhausted under a mortgage before enforcing the obligation secured by the mortgage, the statute also applied to deeds of trust, despite the "anomalous nature of deeds of trust" in California.[76] The court's language was far from the rigid adherence in *Stockwell* to the distinction between mortgages as liens

68. *Id.* at 945.
69. *Id.* at 944 (quoting *MacLeod*, 94 P. at 605).
70. Hollywood Lumber Co. v. Love, 100 P. 698 (Cal. 1909).
71. *Bank of It.*, 20 P.2d at 945 (citing *Hollywood Lumber Co.*, 100 P. at 699).
72. *Id.* at 944 ("The real difficulty is caused by the fact that the courts of this state have not followed the common-law rule.").
73. *Id.* ("At common law and, in fact, in nearly every state in the United States, a deed of trust, both in legal effect and in theory, is deemed to be a mortgage with a power of sale, and differs not at all from a mortgage with a power of sale.").
74. *Id.* at 940–41. This issue was not before the court, and thus it was unnecessary for the court to review the holding in *Stockwell*. *Id.*
75. *Id.* at 945 (analyzing California Code of Civil Procedure section 726).
76. *Id.* The court's analysis of whether section 726 applied to deeds of trust as well as mortgages, even though the statute only mentioned mortgages, is analogous to the discussion of whether section 2932.5 applies to deeds of trust.

and deeds of trust as granting title: "The economic function of the two instruments would seem to be identical. Where there is one and the same object to be accomplished, important rights and duties of the parties should not be made to depend on the more or less accidental form of the security."[77] The court's reasoning anticipated the eventual rejection of the title theory of deeds of trust, and subsequent California cases continued this trend by holding that a deed of trust is simply a security device.[78]

Bank of Italy was not the only instance where a California court determined that a statute, although referring only to mortgages, also applied to deeds of trust. According to the California Supreme Court in *Cornelison v. Kornbluth*, "Section 2929 of the Civil Code, though referring only to 'the lien of a *mortgage*' . . . and to the impairment of 'the *mortgagee's* security,' . . . applies equally to a deed of trust, since [both] are treated similarly in California and both are considered as security interests protected from impairment."[79] Therefore, the California Supreme Court equates deeds of trust with mortgages, in that both are liens on a property, and generally applies the same rules to both.[80] For example, more recently, the California Supreme Court explicitly held in *Monterey S.P. Partnership v. W.L. Bangham, Inc.* that "[i]n practical effect, if not in legal parlance,

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77. *Id.* ("[W]e do not feel justified in holding, merely because 'title' passes by a deed of trust, while only a 'lien' is created by a mortgage, that . . . deeds of trust and mortgages are so different that in one case security must be exhausted before suit on the personal obligation, while, in the other, no such necessity exists. Fundamentally, it cannot be doubted that in both situations the security for an indebtedness is the important and essential thing in the whole transaction.").

78. Strike v. Trans-West Disc. Corp., 155 Cal. Rptr. 132, 137 (Ct. App. 1979) ("Here the trial court found the Strikes retained title to the property at all times. The 'grant deed' was *simply a security device* . . . .").

79. Cornelison v. Kornbluth, 542 P.2d 981, 987 (Cal. 1975) (footnote omitted); *accord* Domarad v. Fisher & Burke, Inc., 76 Cal. Rptr. 529, 535 (Ct. App. 1969) ("[I]n California there is little practical difference between mortgages and deeds of trust, . . . they perform the same basic function, and . . . a deed of trust is 'practically and substantially only a mortgage with power of sale.' . . . [A]lthough 'there are no statutory provisions dictating the form or stating the effect of deeds of trust,' deeds of trust are analogized to mortgages[,] and the same rules are generally applied to deeds of trust that are applied to mortgages." (citations omitted)).

80. *See Cornelison*, 542 P.2d at 987. *But see* Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815, 819 (Ct. App. 2011) ("The *Stockwell* court distinguished a trust deed from a mortgage, explaining that a mortgage creates only a lien, with title to the real property remaining in the borrower/mortgagee, whereas a deed of trust passes title to the trustee with the power to transfer marketable title to a purchaser. . . . The holding of *Stockwell* has never been reversed or modified in any reported California decision in the more than 100 years since the case was decided."). The *Calvo* court held that *Stockwell* was never overruled, *id.*, and yet the California Supreme Court in *Cornelison* had already held that deeds of trust are security interests and liens, not actual transfers of title, implicitly rejecting the legal theory upon which *Stockwell* was based, *Cornelison*, 542 P.2d at 987.

a deed of trust is a lien on the property."[81] Although a deed of trust is said to transfer title to the trustee—title that the trustee reconveys to the debtor upon satisfaction of the debt—"[i]n practical effect, [this] is nothing more than the release of the lien of the deed of trust."[82] Furthermore, whereas the court in *Stockwell* held that deeds of trust were not encumbrances,[83] the *Monterey* court held that "mortgagees and trust deed beneficiaries alike hold security interests in property encumbered by mortgages and deeds of trust."[84]

In 2008, in *Aviel v. Ng*, the California Court of Appeal explicitly rejected the title theory of deeds of trust upon which the *Stockwell* court relied, definitively holding that a deed of trust creates only a lien.[85] As the court did in *Cornelison*, where it found that section 2929 applied equally to deeds of trust and mortgages although the statute only referred to mortgages,[86] the *Aviel* court found that a subordination clause in a lease referring only to mortgages applied equally to deeds of trust.[87] In so doing, the court rejected the argument that a deed of trust conveys legal title and does not create a lien, reasoning that opinions predating *Bank of Italy*, such as *Anglo-California Trust Co. v. Oakland Railways*,[88] were based

81. Monterey S.P. P'ship v. W.L. Bangham, Inc., 777 P.2d 623, 626 (Cal. 1989) (en banc).
82. *Id.*
83. *See supra* notes 62–63 and accompanying text.
84. *Monterey*, 777 P.2d at 627.
85. Aviel v. Ng, 74 Cal. Rptr. 3d 200, 205 (Ct. App. 2008).
86. Cornelison v. Kornbluth, 542 P.2d 981, 987 (Cal. 1975).
87. *Aviel*, 74 Cal. Rptr. 3d at 206–07 ("While there is a difference between the two limitation periods, case law has nonetheless consistently held that the two security instruments serve identical functions and purposes and the same rules should apply to both." (citing Bank of It. Nat'l Trust & Sav. Ass'n, 20 P.2d 940, 944 (Cal. 1933))).
88. Anglo-Cal. Trust Co. v. Oakland Rys., 225 P. 452 (Cal. 1924). In *Anglo-California*, the appellant railway entered into a transaction in which it delivered a promissory note and a deed to its property as collateral for the loan to the respondent trustee. *Id.* at 453. In challenging the trustee's foreclosure action after it defaulted on the loan, the railway argued that the trustee was confined to seeking remedy against the issuer of the note for the amount of the loan, and that the trustee could not initiate a foreclosure sale of the property. *Id.* at 456. The appellant cited section 2888 of the California Civil Code to argue that "a lien, or a contract for a lien, transfers no title to the property subject to the lien." *Id.* at 457 (quoting CAL. CIV. CODE § 2888) (internal quotation marks omitted). However, the court held that because the appellant had transferred to the respondent trustee the title to the property as collateral in the form of a deed of trust transaction—the court referred to this as a "trust agreement"—actual title had been transferred to the trustee. *Id.* The court held, therefore, that this was a transfer in trust, such that the "entire estate and interest of the appellant in the property subject to the trust agreement was vested as an estate, and not as a lien, in the respondent as trustee

on "the obsolete lien versus title theory historically relied on to differentiate the two security instruments."[89] Moreover, the court held that the title theory "has been discredited by the more contemporary jurisprudence . . . which functionally equates the two instruments and recognizes that a deed of trust, for all practical purposes, is a lien on the property."[90] This line of cases shows that *Stockwell*, although not overruled, is no longer good law for the proposition that deeds of trust are not encumbrances or liens and are instead transfers of full title.[91] Accordingly, California courts should not use the reasoning in *Stockwell* to resolve the foreclosure disputes.

B. The Modern Understanding of Deeds of Trust in California: California Treatises Agree that Deeds of Trust Are Practically Only Mortgages with a Power of Sale

Federal district court decisions conflict with the modern understanding of deeds of trust demonstrated by the leading California real estate treatises and the common law history of deeds of trust in California.[92] Although it is true California courts have avoided completely casting aside the legal parlance of *Stockwell*'s era, *California Jurisprudence 3d* and Miller and Starr's *California Real Estate* demonstrate an understanding of deeds of trust in California as practically only mortgages with a power of sale, with the same rules generally applied to both.[93] Currently, according to the accepted California treatises on the subject, there is little difference between a deed of trust and a mortgage.[94] *California Jurisprudence 3d* lists several of the similarities between deeds of trust and mortgages, stating that both mortgages and deeds of trust

> are subject to the same restrictions on remedies for enforcement[;] come within the statutory provisions governing sale under a power, judicial foreclosure, and deficiency judgments[;] are subject to the Federal Truth in Lending Act . . .

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and the trustee cannot be held to have had only a mere lien on the property." *Id.* (citations omitted). This is the title theory which the *Aviel* court deemed "obsolete" when it rejected *Anglo-California* as outdated. *Aviel*, 74 Cal. Rptr. 3d at 206.

89. *Aviel*, 74 Cal. Rptr. 3d at 206.

90. *Id.*

91. Stockwell v. Barnum, 94 P. 400, 402 (Cal. Ct. App. 1908).

92. See *supra* note 14 for the numerous district court cases that held that section 2932.5 does not apply to deeds of trust and that assignments of deeds of trust need not be recorded for valid foreclosures. *Contra* MILLER & STARR, *supra* note 10, § 10:39 (4 Supp. 2012-2013) (explaining that lenders must publicly record the assignments of monetary encumbrances with a power of sale for valid foreclosures); *supra* note 25 and accompanying text.

93. 27 CAL. JUR. 3D *Deeds of Trust* § 4 (2011); MILLER & STARR, *supra* note 10, § 10:2.

94. 27 CAL. JUR. 3D *Deeds of Trust* § 4; MILLER & STARR, *supra* note 10, § 10:2.

> and state consumer protection laws[; and] are included within code definitions of "security document" and "real property security instrument."[95]

According to Miller and Starr's *California Real Estate*, a treatise cited in nearly thirty California Supreme Court decisions,[96] and referred to by Chief Justice Bird of the California Supreme Court as "a leading treatise in the field,"[97] mortgages and deeds of trust are "practically identical."[98] Mortgages with a power of sale have similar legal effects to deeds of trust, and "[b]oth are intended to serve the same economic function of providing security for the performance of an obligation."[99] Although both *California Jurisprudence 3d* and *California Real Estate* recognize that deeds of trust are functionally only security instruments and are practically identical to mortgages, there is one major difference: in the case of a mortgage lacking the power of sale, mortgagees are restricted to using judicial foreclosure, whereas the holder of a deed of trust may engage in a nonjudicial foreclosure.[100]

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95. CAL. JUR. 3D *Deeds of Trust* § 4 (footnotes omitted).

96. *See* Murphy v. Burch, 205 P.3d 289, 292, 297 (Cal. 2009); Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223, 1228 (Cal. 2004); Estate of Stephens, 49 P.3d 1093, 1096–97 (Cal. 2002); Summit Fin. Holdings, Ltd. v. Cont'l Lawyers Title Co., 41 P.3d 548, 551, 552 (Cal. 2002); Kazi v. State Farm Fire & Cas. Co., 15 P.3d 223, 225, 229 (Cal. 2001); Dreyfuss v. Union Bank of Cal., 11 P.3d 383, 387–90 (Cal. 2000); Wm. R. Clarke Corp. v. Safeco Ins. Co. of Am., 938 P.2d 372, 386 (Cal. 1997) (Chin, J., dissenting); City of Manhattan Beach v. Superior Court, 914 P.2d 160, 164, 167–68 (Cal. 1996); Citizens for Covenant Compliance v. Anderson, 906 P.2d 1314, 1332–33, 1340 n.5 (Cal. 1995) (Kennard, J., dissenting); *In re* Morse, 900 P.2d 1170, 1181 (Cal. 1995) (en banc); State *ex rel.* State Lands Comm'n v. Superior Court, 900 P.2d 648, 661 n.3 (Cal. 1995); Bryant v. Blevins, 884 P.2d 1034, 1039 (Cal. 1994) (en banc); Brown v. Green, 884 P.2d 55, 68 (Cal. 1994) (en banc); Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1287 (Cal. 1994) (en banc); Locklin v. City of Lafayette, 867 P.2d 724, 739 (Cal. 1994) (en banc); Sec. Pac. Nat'l Bank v. Wozab, 800 P.2d 557, 560 (Cal. 1990); Phillippe v. Shapell Indus., Inc., 743 P.2d 1279, 1282, 1285 n.9 (Cal. 1987); Petersen v. Hartell, 707 P.2d 232, 244 n.1 (Cal. 1985) (en banc) (Bird, C.J., dissenting); Tenzer v. Superscope, Inc., 702 P.2d 212, 217 n.6 (Cal. 1985) (en banc); Cnty. of L.A. v. Berk, 605 P.2d 381, 392–93 (Cal. 1980); Wellenkamp v. Bank of Am., 582 P.2d 970, 975 & n.8 (Cal. 1978) (en banc); Post Bros. Constr. Co. v. Yoder, 569 P.2d 133, 135 (1977) (en banc); Buehler v. Or.-Wash. Plywood Corp., 551 P.2d 1226, 1231 (Cal. 1976) (en banc); Skopp v. Weaver, 546 P.2d 307, 312 (Cal. 1976) (en banc); Becker v. Lindsay, 545 P.2d 260, 263 (Cal. 1976) (en banc); Tucker v. Lassen Sav. & Loan Ass'n, 526 P.2d 1169, 1174 (Cal. 1974) (en banc); Blank v. Borden, 524 P.2d 127, 130, 132 n.8 (Cal. 1974) (en banc).

97. *Petersen*, 707 P.2d at 244 (Bird, C.J., dissenting).

98. MILLER & STARR, *supra* note 10, § 10:1.

99. *Id.* (footnote omitted).

100. 27 CAL. JUR. 3D *Deeds of Trust* § 4; *see supra* notes 32–37 and accompanying text.

Given that the same rules govern mortgages and deeds of trust,[101] one would predict that California Civil Code section 2932.5 would apply to both instruments. According to *California Real Estate*: "In the case of a monetary encumbrance with a power of sale, an assignee can only enforce the power of sale if the assignment is recorded, because the assignee's authority to conduct the sale must appear in the public records . . . ."[102] Indeed, *California Jurisprudence 3d* agrees, stating: "The [trust deed] assignee has a right to bring a foreclosure action and may exercise the power of sale in a security instrument if the assignment is duly acknowledged and recorded."[103] While the treatises demonstrate a modern understanding that the title theory of deeds of trust is obsolete and that the same rules that govern mortgages should govern deeds of trust, the controversy among the courts shows that the legislature needs to update the code to reflect this modern understanding.[104]

IV. FURTHER COMPLICATIONS: THE RISE OF PRIVATE ALTERNATIVES TO THE PUBLIC RECORDING SYSTEM

Regardless of whether or not section 2932.5 governs deeds of trust, there is also growing controversy over whether a lender or foreclosing assignee must comply with the statute if the information on the assignment is available through a private party, thereby bypassing the public recording system.[105] The public recording system is an expensive and burdensome

101. Domarad v. Fisher & Burke, Inc., 76 Cal. Rptr. 529, 535 (Ct. App. 1969).

102. MILLER & STARR, *supra* note 10, § 10:39 (4 Supp. 2012-2013). See *supra* note 25 for the discussion on how Miller and Starr, as recently as last year, stated that assignments of deeds of trust must be recorded for a valid foreclosure and how the 2012 supplement to Miller and Starr evokes skepticism of recent California appellate decisions that have held otherwise based on the "ancient decision" in *Stockwell v. Barnum*, 94 P. 400 (Cal. Ct. App. 1908).

103. 27 CAL. JUR. 3D *Deeds of Trust* § 112 (2011) (footnotes omitted).

104. *See infra* Part VI.

105. *See, e.g.*, *In re* Salazar, 448 B.R. 814, 824 (Bankr. S.D. Cal. 2011) ("This Court instead joins the courts in other states that have *rejected* MERS' offer of an alternative to the public recording system."), *rev'd*, 470 B.R. 557 (S.D. Cal. 2012). *Contra* Pedersen v. Greenpoint Mortg. Funding, Inc., CIV No. S-11-0642 KJM EFB, 2011 WL 3818560, at *19 (E.D. Cal. Aug. 29, 2011) ("[T]he form language in the deed of trust 'does not . . . require that the nominee have the power to act only when directed by law; rather, the nominee may act on behalf of the Lender as authorized by the deed of trust.' . . . However unfortunately arcane and obscure, the language does nothing more than restate in less than clear terms that the deed of trust authorizes MERS to act on the lender's behalf." (footnotes and citations omitted) (quoting Tapia v. U.S. Bank, N.A., 718 F. Supp. 2d 689, 696 (E.D. Va. 2010))). A few of commentators have discussed the potential dangers of allowing MERS to be recognized as a valid alternative to public recording. *See, e.g.*, Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1400, 1403 (2010) (arguing, among other things, that MERS helped lead to the disintegration of the "land title information infrastructure" and the "decline in the usefulness of public records"

process when large amounts of mortgages or deeds of trust change hands in a single transaction.[106] Thus, a private entity known as MERS arose as a cost-effective alternative.[107]

The transactions that take place in a mortgage loan, or a loan under a deed of trust, are fairly straightforward until transfers take place.[108] In

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because "MERS is usurping the recording fees that once funded maintenance, innovation, and vigilance in public recordkeeping systems"); Nolan Robinson, Note, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) To Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1635–53 (2011) (concluding that giving MERS standing in foreclosure actions undermines homeowner protections and that "MERS's practice of not publically recording assignments of mortgages between MERS members . . . will render the public land records useless by depriving the public of valuable information, and might even insulate predatory lenders from liability." (footnote omitted)).

106. Roger Bernhardt & Alex Volkov, *Challenges to California Foreclosures Based on MERS Transfers* (May 15, 2011, 6:11 PM), http://www.rogerbernhardt.com/index.php/ceb-columns/152-challenges-to-california-foreclosures-based-on-mers-transfers ("The rise of the secondary market and its attendant multiple transfers and pooling of loan documents led to concern over the recordation requirement of assignments of deeds of trust and the recordation fees (and, in some states, imposition of transfer taxes).").

107. Dordan, *supra* note 2, at 177 ("As of 2009, MERS was estimated to be listed as the mortgagee of record on around sixty-million mortgages in total, and according to its own figures, MERS is now being listed as the mortgagee of record on approximately two out of three newly originated residential mortgages nationwide." (footnotes omitted)). Despite the questionable legality of using MERS as a substitute for public recording, it may be a more effective process than the current recording system, a system which MERS claims was not designed to handle the volume of foreclosures in our current economy. Michael A. Valenza, *Digest of Selected Articles*, 40 REAL EST. L.J. 260, 260 (2011) ("With millions of Americans facing foreclosure, every element of the housing finance system is under tremendous strain. What we're seeing now is that the foreclosure process itself was not designed to withstand the extraordinary volume of foreclosures that the mortgage industry and local governments must now handle. . . . The MERS process of tracking mortgages and holding title provides clarity, transparency and efficiency to the housing finance system.").

108. Bernhardt & Volkov, *supra* note 106. According to real estate law professor Roger Bernhardt and co-author Alex Volkov:

> [A] mortgage loan begins its existence with the borrower's execution of a note, promising to repay the loan, and (in California) a deed of trust, entitling the lender to foreclose and sell the borrower's real property if the loan is not paid. In a plain-vanilla situation, both instruments are made out to the lender—as payee of the note and as beneficiary of the deed of trust. The deed of trust, as a title document, is recorded; the note, not affecting title, is not. . . . Since the two documents represent a single loan obligation, they would sensibly be kept together.

Id. Professor Bernhardt and Volkov go on to describe how complicated the transaction becomes when the loan is transferred: "The deed of trust, on the other hand, should be assigned, and perhaps physically transferred, but it is not endorsed like a note is, and its assignment should be recorded, just as the original deed of trust was, and unlike anything done with the note." *Id.*

addition to the complications in transferring a deed of trust, a market developed for the transfer of large amounts of mortgage loans in pools.[109] Fees and the necessity to publicly record every transfer could inhibit this market.[110] This potential problem gave rise to the perceived need for an entity like MERS in the market of loan and mortgage transfers.[111] MERS allows lenders "a clever bypass" by putting the deed of trust "in the name of MERS directly, as some sort of agent of the true lender, and keeping the document under the MERS name."[112] This allowed mortgage transfers to be "made inside MERS's electronic database and outside the public records" until the loan was paid off or the property was foreclosed.[113] However, MERS could not simply step in as an alternative to public recording, especially in states where recording requirements are imposed by statute.[114] Therefore, MERS also stepped in as the new beneficiary of record in the deed of trust, even though the lender would still receive the payments from the borrower.[115] MERS's "limited" role is to replace the recording process and facilitate transfers of large quantities of mortgages and deeds of trust.[116] However, controversy arose as to whether MERS has any authority to initiate foreclosures as the beneficiary under the deed of trust.[117] Indeed, it is disputed whether MERS even qualifies as a beneficiary given its limited interest in the loan.[118]

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109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *See, e.g.*, *In re* Salazar, 448 B.R. 814, 824 (Bankr. S.D. Cal. 2011) ("This Court instead joins the courts in other states that have *rejected* MERS' offer of an alternative to the public recording system."), *rev'd*, 470 B.R. 557 (S.D. Cal. 2012).
115. *See* Bernhardt & Volkov, *supra* note 106 ("The drafting mechanism chosen to accomplish this was the naming of MERS as 'nominee' and 'beneficiary of record' in the deed of trust, separate from the lender."). According to Professor Bernhardt and Volkov: "MERS is not your lender; it is a company that provides an alternative means of registering the mortgage lien in the public records. . . . Naming MERS as the mortgagee and registering the mortgage on the MERS electronic tracking system does not affect your obligation to your lender . . . ." *Id.* (citation omitted).
116. *See id.* ("Unsurprisingly, MERS is not named in the note—as lender, payee, or anything else.").
117. Valenza, *supra* note 107, at 265–66 ("MERS has instituted numerous foreclosure actions in its own name as mortgagee or assignee, to which foreclosure defendants have presented defenses including lack of standing. Peterson's opinion that MERS does not have standing follows from his conclusion that MERS does not hold legal title to the mortgage either as an original mortgagee or as an assignee." (citing Peterson, *supra* note 105)).
118. *See* David R. Greenberg, Comment, *Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures*, 83 TEMP. L. REV. 253, 278–82 (2010) (discussing, among other things, "the legal reasons why a non-assignee should not be given standing to foreclose on a given property in federal court and the policy downsides to allowing a nonassignee plaintiff to foreclose"). For more

Mortgage lenders pay annual fees to become members of MERS and MERS becomes their agent in order to act on all the mortgages they register.[119] The mortgages are publicly recorded with MERS named as the nominee of the lender or mortgagee of record.[120] The lenders may then assign the beneficial ownership or servicing rights to other MERS members.[121] These assignments are tracked in MERS's private records, but they are not publicly recorded.[122] As a result, borrowers are not notified of transfers of beneficial ownership, only servicing rights.[123] Lenders' and financial institutions' attempts to bypass the public recording system has led to what some see as a decline in the public's ability to access information and the danger that lenders may be less accountable due to the lack of notification regarding these transactions.[124]

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information about the controversial role of MERS despite its limited interest in the loan, see Peterson, *supra* note 105, at 1377–78. Among other things, Peterson notes that

> MERS does not fund any loans. No money coming out of a MERS deposit account is tendered as loan principal to homeowners. . . . [N]o homeowners promise to pay MERS any money. To this effect, MERS is never identified as the payee in a promissory note and . . . MERS is never entitled to receive the proceeds of a foreclosure sale. Instead, these funds go to the actual mortgagee (or assignee of the mortgagee), who is the true owner of the lien.

Id.

119. Burgett v. Mortg. Elec. Registration Sys., Inc., No. 09-6244-HO, 2010 WL 4282105, at *2 (D. Or. Oct. 20, 2010) (quoting Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727, 741–42 (2009)).

120. *Burgett*, 2010 WL 4282105, at *2 (quoting Korngold, *supra* note 119, at 741–42).

121. *Id.* (quoting Korngold, *supra* note 119, at 741–42).

122. *Id.* (quoting Korngold, *supra* note 119, at 741–42). MERS claims on its website that these transfers are in fact recorded in the public records office, but MERS does not record the assignments, it only tracks them. MERS INC., *supra* note 3. Furthermore, numerous cases demonstrate that the parties transferring the deeds of trust have failed to publicly record the assignment despite MERS's assertions. *See supra* note 14.

123. *Burgett*, 2010 WL 4282105, at *2 (quoting Korngold, *supra* note 119, at 741–42). Although homeowners are not notified of transfers of beneficial ownership, MERS has recently begun allowing borrowers to access this information through its private database. MERS INC., *supra* note 3. This is a very recent development, and the California Legislature should take steps to ensure that MERS continues to provide such access in order to provide adequate protection to homeowners.

124. *See, e.g.*, Peterson, *supra* note 105, at 1404; Robinson, *supra* note 105, at 1635–39, 1651–52.

One problem with MERS is that borrowers are not notified when there is a transfer of the beneficial ownership of the loan.[125] Thus, borrowers are often unaware of who has the power to foreclose on their property,[126] and until very recently, homeowners were unable to access this information about their home loans. In July 2012, however, Delaware became the first state to take MERS to task and was able to secure certain concessions from MERS to protect Delaware homeowners' access to this information.[127] Delaware's Attorney General sued MERS and obtained MERS's agreement to provide a database for homeowners to find out who owns their loans and services their deeds of trust.[128] MERS members must also record any mortgage assignments in the county recorder of deeds office before any foreclosure can take place in Delaware.[129] Perhaps in reaction to developments in Delaware, MERS now advertises that it provides free access for homeowners to information about their mortgages.[130] Although such concessions from MERS are a step in the right direction for consumers, states lacking such direct promises from MERS should not leave homeowner protection to the whims of a private organization. Furthermore, although two-thirds of all home loans in the United States are registered with MERS,[131] borrowers that account for the other third may lack sufficient information about their home loans in states that do not require the recording of deed of trust assignments. California must draft legislation to ensure adequate protection for borrowers under deeds of trust should it choose to recognize the validity of MERS as an alternative to public recordings.

Courts come to different conclusions as to the validity of this private system of recording.[132] In fact, MERS is a frequent defendant in cases

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125. *See* Dordan, *supra* note 2, at 178–79 ("The public records will show only MERS as the mortgagee, and it can be difficult to track down who is the beneficial owner of the borrower's obligation.").

126. *Id.* (citations omitted) ("'[The] transfer of an interest in a mortgage loan between two MERS members is unknown to those outside the MERS system.' . . . The public records will show only MERS as the mortgagee, and it can be difficult to track down who is the beneficial owner of the borrower's obligation . . . 'thereby creating the opportunity for substantial abuses and prejudice to mortgagors . . . .'" (footnotes omitted) (quoting Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 490 (Minn. 2009); Landmark Nat'l Bank v. Kesler, 216 P.3d 158, 168 (Kan. 2009))); *see also* McIntire, *supra* note 1 (describing how MERS obscures loan ownership).

127. *See MERS Reaches Agreement*, *supra* note 3.

128. *Id.*

129. *Id.*

130. *About Us*, MERS INC., http://www.mersinc.org/about-us/about-us (last visited May 7, 2013).

131. Christopher Ketcham, *Stop Payment!: A Homeowner's Revolt Against the Banks*, HARPER'S MAG., Jan. 2012, at 28, 29.

132. *See In re* Salazar, 448 B.R. 814, 824 (Bankr. S.D. Cal. 2011) (joining other courts in rejecting MERS as an alternative to the public recording system), *rev'd*, 470

that discuss whether a foreclosure is valid where the assignment of a deed of trust is not publicly recorded because it champions itself as an alternative to public recordings.[133] Perhaps the MERS system is more effective than the public recording system and states will increasingly accept MERS as a valid substitute, but the various state legislatures must enact this change to a private system; it is not something courts or the private companies may change in clear opposition to the law.[134] Indeed, numerous states, such as Oregon, have statutes that require a public recordation of an assignment prior to a valid foreclosure.[135] Furthermore, several courts have rejected MERS as a legal substitute for public recording when statutes that require the recording are still on the books.[136]

B.R. 557 (S.D. Cal. 2012). *Contra* Pedersen v. Greenpoint Mortg. Funding, Inc., CIV No. S-11-0642 KJM EFB, 2011 WL 3818560, at *19 (E.D. Cal. Aug. 29, 2011) ("However unfortunately arcane and obscure, the language does nothing more than restate in less than clear terms that the deed of trust authorizes MERS to act on the lender's behalf." (footnote omitted)).

133. See Valenza, *supra* note 107, at 260, for an example of how MERS promotes itself. Valenza also discusses the multitude of lawsuits in which MERS is named as defendant and quotes a federal district court judge on the confusion the lawsuits are causing for the courts: "[A]ll too often [nonjudicial foreclosures] are mystifying, because of the utterly confusing assignments, substitutions, and other transactions (some recorded, some not) conducted by a host of entities." *Id.* at 263 (quoting Sacchi v. Mortg. Elec. Registration Systems, Inc., CV 11-1658 AHM (CWx), 2011 U.S. Dist LEXIS 68007 (C.D. Cal. June 24, 2011)) (internal quotation marks omitted).

134. *See, e.g.*, *Salazar*, 448 B.R. at 824 (rejecting MERS as a valid substitute for a public recording system because the California Legislature has not yet authorized the use of private recording systems as an alternative and stating that "overlook[ing] statutory foreclosure requirements would require legislative action, of which the Court is not capable"). Regardless of how effective MERS's system is, the concern remains that the pooling and transfer of large quantities of mortgages and deeds of trust at a rapid rate may contribute to economic instability. *See* Peterson, *supra* note 105, at 1398 (identifying several MERS-related factors that have enabled predatory lending and may have contributed to the mortgage foreclosure crisis).

135. *See, e.g.*, OR. REV. STAT. § 86.735 (2011) ("The trustee may foreclose a trust deed by advertisement and sale in the manner provided in ORS 86.740 to 86.755 if: (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated . . . ."); *see also* IDAHO CODE ANN. § 45-1505 (Supp. 2012) ("Foreclosure of trust deed, when.—The trustee may foreclose a trust deed by advertisement and sale under this act if: (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated . . . .").

136. *See, e.g.*, *Salazar*, 448 B.R. at 824. In rejecting MERS as an alternative to statutorily required public recordings, the *Salazar* court joined several other courts that had done the same. *See In re* McCoy, 446 B.R. 453, 457 (Bankr. D. Or. 2011); *In re* Agard, 444 B.R. 231, 254 (Bankr. E.D.N.Y. 2011); Mortg. Elec. Registration Sys., Inc.

V. THE INEVITABLE CONFUSION: DISTRICT COURTS AND BANKRUPTCY COURTS BUTT HEADS OVER SECTION 2932.5 AND MERS

California Real Estate and *California Jurisprudence 3d* interpret the California jurisprudence regarding deeds of trust as defining them as security devices, as opposed to passing actual title, and as requiring lenders to record assignments of deeds of trust prior to foreclosures.[137] Indeed, the U.S. Bankruptcy Court for the Southern District of California came to the same conclusion in interpreting the cases that followed *Stockwell*.[138] But despite the California treatises' certainty that a deed of trust must be recorded prior to a valid foreclosure, federal district courts in California firmly take the opposite position.[139]

A. District Courts in California Hold Section 2932.5 Applies Only to Mortgages

Between 2010 and 2011, a series of district court decisions, mostly relying on *Stockwell*, held that section 2932.5 applied only to mortgages and not to deeds of trust.[140] In *Roque v. Suntrust Mortgage, Inc.*, for example, the court rejected the plaintiff's theory that the challenged foreclosure was invalid because the defendants failed to record the assignment of the deed of trust on the property.[141] The plaintiff claimed he sought refinancing, secured by a deed of trust, for the loan on his property from a mortgage lending company.[142] The plaintiff alleged that, after the closing of the loan, the original mortgage lender entered into a Pooling and Servicing Agreement (PSA) with other banks and lenders which effectively sold the plaintiff's loan into a "pool of securitized loans

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v. Saunders, 2 A.3d 289, 295 (Me. 2010); LaSalle Bank Nat'l Ass'n v. Lamy, No. 030049/2005, 2006 WL 2251721, at *3 (N.Y. Sup. Ct. Aug. 7, 2006).

137. *See supra* Part III.B.

138. *Salazar*, 448 B.R. at 820–22.

139. *See* Estillore v. Countrywide Bank FSB, No. CV F 10 1243 LJO GSA, 2011 WL 348832, at *15 (E.D. Cal. Feb. 2, 2011); Jacobs v. Bank of Am., N.A., No. C10 04596 HRL, 2011 WL 250423, at *5 (N.D. Cal. Jan. 25, 2011); Park v. Wachovia Mortg., FSB, No. 10cv1547 WQH RBB, 2011 WL 98408, at *8–9 (S.D. Cal. Jan. 12, 2011); Washington v. Nat'l City Mortg. Co, No. C 10 5042 SBA, 2010 WL 5211506, at *4 (N.D. Cal. Dec. 16, 2010); Caballero v. Bank of Am., No. 10 CV 02973 LHK, 2010 WL 4604031, at *3 (N.D. Cal. Nov. 4, 2010); Selby v. Bank of Am., Inc., No. 09cv2079 BTM(JMA), 2010 WL 4347629, at * 3 (S.D. Cal. Oct. 27, 2010); Parcray v. Shea Mortg., Inc., No. CV-F-09-1942 OWW/GSA, 2010 WL 1659369, at *11 (E.D. Cal. Apr. 23, 2010); Roque v. Suntrust Mortg., Inc., No. C 09 00040 RMW, 2010 WL 546896, at *3 (N.D. Cal. Feb. 10, 2010).

140. *See supra* note 14.

141. *Roque*, 2010 WL 546896, at *3.

142. *Id.* at *1.

comprised of thousands . . . of notes and deeds of trust of other borrowers."[143] After the plaintiff defaulted on the loan, the plaintiff challenged the foreclosure initiated by the new lenders and MERS, arguing that the power of sale in the deed of trust was invalid under section 2932.5 because the assignment of the deed of trust from the original mortgage lender was never recorded, and therefore no chain of ownership existed.[144] Nevertheless, the court held that the foreclosure under the deed of trust was valid even though the assignment had not been recorded prior to the foreclosure sale.[145]

Despite California courts applying the same rules to mortgages and deeds of trust, the court in *Roque* definitively stated that "Section 2932.5 applies to mortgages, not deeds of trust. It applies only to mortgages that give a power of sale to the creditor, not to deeds of trust which grant a power of sale to the trustee."[146] In its reasoning, the court succinctly supported its conclusion that trustees may "foreclose on behalf of assignees for the original beneficiary."[147] But the court did not explain why section 2932.5 applied to mortgages and not deeds of trust.[148] Although the trend in California since *Bank of Italy* is to apply the same rules that govern mortgages to deeds of trust, the court concluded that "non-judicial foreclosures are governed exclusively by Cal. Civ. Code Section 2924–2924i."[149]

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143. *Id.* (citation omitted).
144. *Id.* at *2.
145. *Id.* at *3.
146. *Id.*
147. *Id.* (citing *In re* Golden Plan of Cal., Inc., 829 F.2d 705, 708–11 (9th Cir. 1987)). In *Golden Plan*, the court's holding that a trustee may "foreclose on behalf of assignees for the original beneficiary," *id.*, may be important to the discussion of whether a trustee may foreclose on a property on behalf of an assignee, but was in the context of a bankruptcy case in which investors gave funds to a loan brokerage company to make real estate loans, often to unstable borrowers. *Golden Plan*, 829 F.2d at 707. The investors would receive "whole or partial assignments of notes and trust deeds held by Golden Plan." *Id.* Investors forced Golden Plan into bankruptcy and the bankruptcy trustee requested that the court issue thousands of trust deeds and notes to the investors. *Id.* However, the dispute in the case was primarily about the ownership interests held by the investors and whether certain monetary advances to investors by Golden Plan were fraudulent conveyances. *Id.* at 707–08. This case cited by *Roque* sheds little light on the debate on whether the assignment of a deed of trust must be publicly recorded for a valid foreclosure.
148. *Roque*, 2010 WL 546896, at *3.
149. *Id.*

Numerous district court cases followed *Roque*, creating an increasing body of authority among the California district courts.[150] The cases that followed, for example, *Caballero v. Bank of America*, also cited *Stockwell* for its distinction between deeds of trust and mortgages, and stated that *Stockwell* was "[t]he only California state court decision on point."[151] In *Aviel v. Ng*, the court rejected arguments based on the title theory of deeds of trust that predated *Bank of Italy*, rejecting the title theory as outdated.[152] However, *Caballero* quoted *Bank of Italy* as harmonious with *Stockwell*, quoting only its mention that a "deed of trust differs from a mortgage in that title passes to the trustee in case of a deed of trust, while in [the] case of a mortgage, the mortgagor retains title."[153] *Caballero*'s and the other district courts' analyses also lack the California Supreme Court's recognition, and perhaps tacit approval, of the increasingly blurred line between deeds of trust and mortgages with a power of sale in *Bank of Italy*.[154] Nor do the decisions account for the holding in *Monterey S.P. Partnership v. W.L. Bankham, Inc.* that, although the legal parlance still describes the passage of "title" in regard to a deed of trust, deeds of trust are practically only liens on the property.[155] Furthermore,

150. *See* Parcray v. Shea Mortg., Inc., No. CV-F-09-1942, 2010 WL 1659369, at *11 (E.D. Cal. Apr. 23, 2010) ("There is no requirement under California law for an assignment to be recorded in order for an assignee beneficiary to foreclose." (citing *Roque*, 2010 WL 546896, at *3–5)); *see also* Estillore v. Countrywide Bank FSB, No. CV F 10 1243 LJO GSA, 2011 WL 348832, at *15 (E.D. Cal. Feb. 2, 2011) ("California's non-judicial foreclosure statutes do not require a recording of assignments of interests in deeds of trust prior to foreclosure." (citing *Parcray*, 2010 WL 1659369, at *11; *Roque*, 2010 WL 1659369, at *3)); Jacobs v. Bank of Am., N.A., No. C10 04596 HRL, 2011 WL 250423, at *5 (N.D. Cal. Jan. 25, 2011) ("Non-judicial foreclosures are governed exclusively by California Civil Code section 2924-2924i." (citing *Roque*, 2010 WL 1659369, at *3)); Park v. Wachovia Mortg., FSB, No. 10cv1547 WQH RBB, 2011 WL 98408, at *9 (S.D. Cal. Jan. 12, 2011) (citing *Parcray*, 2010 WL 1659369, at *12) (holding that section 2932.5 applies to mortgages, not deeds of trust); Washington v. Nat'l City Mortg. Co, No. C 10 5042 SBA, 2010 WL 5211506, at *4 (N.D. Cal. Dec. 16, 2010) (citing Selby v. Bank of Am., Inc., No. 09cv2079 BTM(JMA), 2010 WL 4347629, at *3 (S.D. Cal. Oct. 27, 2010); *Roque*, 2010 WL 546896, at *3) (holding that section 2932.5 does not apply to deeds of trust); *Selby*, 2010 WL 4347629, at *3 (citing *Parcray*, 2010 WL 1659369, at *11; *Roque*, 2010 WL 546896, at *3) (holding that section 2932.5 does not apply to deeds of trust).

151. Caballero v. Bank of Am., No. 10-CV-02973-LHK, 2010 WL 4604031, at *3 (N.D. Cal. Nov. 4, 2010) (citing Stockwell v. Barnum, 94 P. 400, 402 (Cal. Ct. App. 1908)).

152. Aviel v. Ng, 74 Cal. Rptr. 3d 200, 206 (Ct. App. 2008).

153. *Caballero*, 2010 WL 4604031, at *3 (quoting Bank of It. Nat'l Trust & Sav. Ass'n v. Bentley, 20 P.2d 940, 944 (Cal. 1933)).

154. *See id. But see Bank of It.*, 20 P.2d at 945 ("This view, that deeds of trust, except for the passage of title for the purpose of the trust, are practically and substantially only mortgages with a power of sale, in addition to the cases cited in the above opinion, has many times been recognized in other decisions.").

155. Monterey S.P. P'ship v. W.L. Bankham, Inc., 777 P.2d 623, 626 (Cal. 1989) (en banc). The holding in *Monterey* should put courts on notice that deeds of trust no

the district courts' analyses fail to acknowledge the explicit rejection of the title theory in *Aviel*.[156]

B. Bankruptcy Court for the Southern District of California Holds that Section 2932.5 Applies to Deeds of Trust in Salazar

Against a current of district court opinions with facts and holdings similar to *Roque* and *Caballero*, the U.S. Bankruptcy Court for the Southern District of California decided *In re Salazar*, in which the court held that *Stockwell* was outdated and that California courts should apply section 2932.5 to deeds of trust as well as mortgages.[157] The court found that *Stockwell*'s outdated distinction should not deprive borrowers under deeds of trust from the same protections afforded to borrowers under mortgages.[158] Furthermore, the court found that section 2932.5 "protects borrowers from confusion as to the ownership of their loans."[159] The court also reasoned that the need to protect borrowers from confusion—the concern addressed by section 2932.5 by identifying the assignee of the loan—is now "more exigent, not less, than it was during the Great Depression, when *Bank of Italy* was decided" because current problems with the mortgage foreclosure process are "widely chronicled."[160] The court noted that these problems in the mortgage process are especially

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longer transfer actual title, but the opposite has proven true as the district courts fail to even analyze *Monterey* in their adherence to *Stockwell*. *See, e.g.*, *Caballero*, 2010 WL 4604031, at *3.

156. *Aviel*, 74 Cal. Rptr. 3d at 206. *Aviel* held that the title theory of mortgages, in which actual title is transferred in a mortgage or deed of trust, was "obsolete." *Id.* For *Caballero* and other district courts to follow *Stockwell*, which was based on the outdated title theory, ignores this important precedent. *See, e.g.*, *Caballero*, 2010 WL 4604031, at *3.

157. *In re* Salazar, 448 B.R. 814, 820–22 (Bankr. S.D. Cal. 2011), *rev'd*, 470 B.R. 557 (S.D. Cal. 2012). The court recognized the holdings of the district court cases, but respectfully noted that it was not bound by them. *Id.* at 820 n.8 (citing *In re* Silverman, 616 F.3d 1001, 1005 (9th Cir. 2010)).

158. *Id.* at 821 ("[I]mportant rights and duties of the parties should not be made to depend on the more or less accidental form of the security." (quoting *Bank of It.*, 20 P.2d at 945) (internal quotation marks omitted)).

159. *Id.*

160. *Id.* (citing Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 148–49 (2008); Andrew J. Kazakes, Developments in the Law, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 LOY. L.A. L. REV. 1383, 1430 (2010); Eric Dash, *A Paperwork Fiasco*, N.Y. TIMES, Oct. 24, 2010, at WK5; David Streitfeld, *3rd Lender Will Freeze Foreclosure in the Courts*, N.Y. TIMES, Oct. 2, 2010, at B1).

apparent in bankruptcy cases, as there are "serious distributional consequences to all parties in a bankruptcy if a mortgagee cannot prove it holds a valid security interest."[161] Throughout the opinion, and in stark contrast to the district court decisions, the bankruptcy court showed a concern for borrower protections, in addition to the danger of allowing a gap in title.[162] Furthermore, the court reasoned that the California Supreme Court rejected the title theory of deeds of trust, and held that section 2932.5 therefore applied to deeds of trust as well as mortgages.[163]

In addition to holding that section 2932.5 requires lenders to record deed of trust assignments, the *Salazar* court held that MERS was not a valid alternative to the public recording system.[164] The court noted that "circumventing the public recordation system is, in fact, the purpose for which the MERS system was created."[165] However, the court held that the creation of a private system was "not enforceable to the extent it departs from California law."[166] In conclusion, the court held that foreclosing assignees in California are obligated to record their interest before a foreclosure sale may take place and that assignees cannot use MERS to circumvent the requirements of section 2932.5.[167]

C. The Reaction to Salazar

1. Consumer Attorneys Celebrate Salazar

Naturally, foreclosure defense attorneys, debtors' counsel, and other consumer attorneys met *Salazar* with jubilation. For example, one

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161. *Id.* at 822 (quoting Porter, *supra* note 160, at 148–49) (internal quotation marks omitted).

162. *Id.* at 821–24. *Contra* Pedersen v. Greenpoint Mortg. Funding, Inc., CIV No. S-11-0642 KJM EFB, 2011 WL 3818560, at *18 (E.D. Cal. Aug. 29, 2011) (holding that the purpose of section 2932.5 is to give notice to prospective purchasers and mortgagees, not to avoid confusion among borrowers).

163. *Salazar*, 448 B.R. at 822 ("Because controlling Supreme Court authority requires this Court to enforce statutory borrower protections regardless of whether nonjudicial foreclosure is sought under a mortgage or a deed of trust, the Court must conclude Civil Code section 2932.5 applies to U.S. Bank's [deed of trust] here.").

164. *Id.* at 824.

165. *Id.* at 824 n.14 (citing Merscorp, Inc. v. Romaine, 861 N.E.2d 81 (N.Y. 2006)).

166. *Id.*; *see also id.* at 824 ("To overlook statutory foreclosure requirements would require legislative action, of which the Court is not capable. This Court instead joins the courts in other states that have rejected MERS' offer of an alternative to the public recording system." (citations omitted)). In so finding, the court rejected "U.S. Bank's invitation to overlook the statutory foreclosure mandates of California law, and rely upon MERS as an extra-judicial commercial alternative." *Id.* at 824 (footnote omitted).

167. *Id.* Since *Salazar*, the U.S. Bankruptcy Court for the Southern District of California has had the opportunity to consider at least one other case with similar facts and held once again that section 2932.5 applies to deeds of trust. *See In re* Cruz, 457 B.R. 806, 814–16 (Bankr. S.D. Cal. 2011).

consumer attorney blog heralded the decision as taking MERS and the lenders to task for their unjust attempts to avoid compliance with section 2932.5.[168] Another blog praised *Salazar*'s "Good Issues, Great Holding, and Excellent Decision."[169] The author described how foreclosure defense attorneys were "waiting for some good cases to come out that clarify some of the more nebulous concepts in foreclosure defense law. . . . While everyone was talking about [section 2932.5] applying ONLY to mortgages, the California Southern District [B]ankruptcy Court recently came down and said hogwash . . . ."[170] However, the danger with so much celebration, and with taglines such as **"**California Lenders, Loan Servicers, MERS and other foreclosing entities should ensure valid legal compliance with California Civil Code Section 2932.5 or risk hav[ing] the foreclosure sale being declared VOID (with no obligation to tender)," is that the advocates of borrowers may appear to be celebrating the ability of borrowers to escape from their obligations.[171] This clearly was not the bankruptcy

168. *Assignment of California Deed of Trust Must Be Recorded Before Foreclosure—MERS Process Does Not Trump California Real Estate Law*, CAL. REAL ESTATE LAW. BLOG (Apr. 11, 2011), http://www.calrealestatelawyersblog.com/2011/04/assignment-of-california-deed.html ("Bankruptcy courts in California have more readily addressed the arrogance of the MERS cabal of lenders efforts to circumvent state law.").

169. Steve Vondran, *SHAZAM SALAZAR—Southern District Bankruptcy Court of California Says California Civil Code Section 2932.5 Applies to Mortgages AND Deeds of Trust—Wrongful Foreclosure Is Illuminated!*, FORECLOSURE DEF. RESOURCE CENTER (Apr. 12, 2011), http://www.foreclosuredefenseresourcecenter.com/2011/04/shazam-southern-district-bankruptcy-court-of-california-says-california-civil-code-section-2932-5-applies-to-mortgages-and-deeds-of-trust.

170. *Id.*

171. *Id.* Debtors should be able to challenge foreclosures where the lender has failed to obey the law, but in some cases the debtor is incapable of paying the loan regardless of how the foreclosure process took place. *See* Steve Vondran, *The Lender Promises Not To Foreclose, Then They Sell the Property and Demand You Tender the Loan Balance To Challenge the Sale*, FORECLOSURE DEF. RESOURCE CENTER (Aug. 15, 2011), http://www.foreclosuredefenseresourcecenter.com/2011/08/can-the-lender-require-tender-of-the-loan-balance. Allowing such debtors to challenge foreclosures could create frivolous legal proceedings. *Id.* Lenders may instead argue for the court to use the tender rule that requires the debtor to pay the balance of the loan in order to challenge the foreclosure. *Id.* ("[Lenders] will argue . . . that you cannot make a valid legal challenge [to foreclosure] unless you can 'tender the balance of the loan' that you owe on. . . . The principle is based on the fact that the court should not overturn a sale for minor irregularities, if it just puts a borrower right back into a defaulting position and where that result is deemed inequitable."). For more information about the "spectrum" of assignment and foreclosure deficiencies that courts wrestle with in determining the severity of neglect by lenders and the factors that may lead to foreclosure dismissals, with a focus on issues of standing, see generally Greenberg, *supra* note 118, at 253.

court's intent when it warned against the "serious distributional consequences to all parties."[172]

2. District Courts in California Respond: Rejecting Salazar

While consumer attorneys rejoiced, the district courts continued to decide cases contrary to the detailed analysis and outcome of *Salazar*.[173] In response to *Salazar*, the district courts have provided more in-depth discussions of the common law history and legislative purpose behind section 2932.5 to conclude that section 2932.5 applies only to mortgages and that providing protection to homeowners was never the legislature's motivation in enacting the statute.[174]

Perhaps the most detailed California district court case analysis after *Salazar* is *Pedersen v. Greenpoint Mortgage Funding, Inc.*[175] The *Pedersen* court recognized the similarities between mortgages and deeds of trust and that California courts have treated them as practically the same.[176] Nonetheless, the court reasoned that substantial differences remained, such as the technical passage of title in a deed of trust, and found that such differences still justified the conclusion that section 2932.5 does not apply to deeds of trust.[177] The court relied upon *Stockwell* as the last word on the passage of title for the purposes of a deed of trust.[178] However, the court's analysis lacked *Aviel*'s rejection of the obsolete lien versus

172. *In re* Salazar, 448 B.R. 814, 822 (Bankr. S.D. Cal. 2011) (quoting Porter, *supra* note 160, at 148–49) (internal quotation marks omitted), *rev'd*, 470 B.R. 557 (S.D. Cal. 2012).

173. *See, e.g.*, Pedersen v. Greenpoint Mortg. Funding, Inc., CIV No. S-11-0642 KJM EFB, 2011 WL 3818560, at *17–18 (E.D. Cal. Aug. 29, 2011).

174. *See, e.g., id.* at *18 (holding that section 2932.5's purpose is to give notice to purchasers and mortgagees).

175. *See id.* at *16–17 (discussing *Salazar* in great detail).

176. *Id.* at *17.

177. *Id.* at *18 ("In the *mortgage*, title remains with the mortgagor until a foreclosure sale; then it passes from the mortgagor to the purchaser. In the *deed of trust*, title passes to the trustee, who holds it until default; then, after sale, it goes from the trustee to the purchaser. . . . Even though the trustee of a deed of trust holds title only 'so far as may be necessary to the execution of the trust,' this difference underlies the different application of section 2932.5." (citations omitted) (quoting Bank of It. Nat'l Trust & Sav. Ass'n v. Bentley, 20 P.2d 940 (Cal. 1933))).

178. *Id.* ("In *Stockwell* . . . the court found a directed sale valid, even though the assignment of the deed of trust to the person who directed the sale had not been recorded. It noted that . . . section 2932.5[] did not apply to deeds of trust. It reasoned that in a mortgage, the authority of the mortgagee to sell must be clear, whereas with a deed of trust, the trustee holds the title, 'thus enabling him in executing the trust, to transfer to the purchaser a marketable record title. It is immaterial who holds the note.'" (quoting Stockwell v. Barnum, 94 P. 400, 402 (Cal. Ct. App. 1908))).

title theory, as well as *Aviel*'s rejection of cases prior to *Bank of Italy* for the purpose of interpreting deeds of trust.[179]

The *Pedersen* court's opinion was also unconcerned with the *Salazar* court's consumer protection policy to avoid confusion among borrowers as well as prospective purchasers.[180] Indeed, the *Pedersen* court concluded that the sole purpose of section 2932.5 is to give notice to prospective purchasers or mortgagees and that this recorded notice is unnecessary in the case of a deed of trust because "the trustee conducts the sale and transfers title, which sale and transfer carry a presumption of regularity."[181]

The conflicting interpretations by *Salazar* and *Pedersen* demonstrate the need for the California Legislature to intervene and clarify whether section 2932.5's sole purpose is to give notice to prospective purchasers, such that borrower protection is not within its ambit, because the issue is a question of legislative intent.[182] Moreover, it is a question of legislative intent as to whether the passage of "title" in the title theory of deeds of trust should be completely abolished.[183]

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179. *Compare id.* at *16–18, *with* Aviel v. Ng, 74 Cal. Rptr. 3d 200, 206 (Ct. App. 2008).

180. *Pedersen*, 2011 WL 3818560, at *18. *Contra In re* Salazar, 448 B.R. 814, 821 (Bankr. S.D. Cal. 2011) (holding that section 2932.5 "protects borrowers from confusion as to the ownership of their loans"), *rev'd*, 470 B.R. 557 (S.D. Cal. 2012).

181. *Pedersen*, 2011 WL 3818560, at *18.

182. *See* People v. Hall, 124 Cal. Rptr. 2d 806, 814 (Ct. App. 2002) ("[W]e interpret the clause in light of well-established principles of statutory construction. The starting point for statutory construction is 'the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent.'" (quoting People v. Woodhead, 741 P.2d 154, 156 (Cal. 1987))); 58 CAL. JUR. 3D *Statutes* § 109 (2012) ("When interpreting a statute, a court starts with language of statute to determine if the words used unequivocally express the legislature's intent given that the primary rule of statutory construction, to which all other such rules are subject, is that the courts must ascertain the intent of the legislature, whenever possible, in order to effectuate the purpose of the law." (footnotes omitted)); *see also* CAL. CIV. PROC. CODE § 1858 (West 2007) ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.").

183. *See Hall*, 124 Cal. Rptr. 2d at 814.

3. For the First Time in a Century: A California Appellate Court Discusses Section 2932.5

In 2011, for the first time since *Stockwell* in 1908, a California appellate court addressed the question of whether section 2932.5 applies to deeds of trust in *Calvo v. HSBC Bank USA, N.A.*[184] In its analysis, the court relied in part on the reasoning of the federal district courts in California and decided that, in California, deeds of trust have replaced mortgages, and that section 2932.5 is now practically obsolete despite its references to mortgages.[185] The court gave great deference to the district courts and agreed that *Stockwell* was the only case on point on the issue of whether 2932.5 applies to deeds of trust.[186] Ultimately, the court held that because *Stockwell* was never overruled it is still good law, thus solidifying *Stockwell*'s holding that the recording of an assignment of a deed of trust is not required for a valid foreclosure.[187]

Although *Calvo* used the same analysis as the district courts by relying on *Stockwell* and distinguishing *Bank of Italy*, the decision failed to analyze numerous other binding California precedents that discussed deeds of trust. For example, *Calvo* neglected decisions such as *Cornelison*, wherein the California Supreme Court held that mortgages with a power of sale and deeds of trust are considered security interests and are treated similarly.[188] The *Calvo* court also failed to analyze the California Supreme Court's holding in *Monterey* that a deed of trust is, in practical effect, a lien on the property.[189] These holdings should put courts on notice that

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184. Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815, 818–20 (Ct. App. 2011).

185. *Id.* at 819–21 ("In California, over the course of the past century, deeds of trust have largely replaced mortgages as the primary real property security device. Thus, section 2932.5 (and its predecessor, section 858) became practically obsolete and were generally ignored by borrowers, creditors, and the California courts." (citation omitted)).

186. *Id.* at 819.

187. *Id.* ("The holding of *Stockwell* has never been reversed or modified in any reported California decision in the more than 100 years since the case was decided. The rule that section 2932.5 does not apply to deeds of trust is part of the law of real property in California."). The court distinguished *Bank of Italy* as not having decided the same issue. *Id.* at 820 ("The court recognized there were an increasing number of cases that applied the same rules to deeds of trust that are applied to mortgages and concluded that 'merely because "title" passes by a deed of trust while only a "lien" is created by a mortgage,' in both situations the security must be exhausted before suit on the personal obligation. Nothing in the holding or analysis of the *Bank of Italy* opinion supports plaintiff's position here that we should find section 2932.5 applies to a deed of trust." (citation omitted) (quoting Bank of It. Nat'l Trust & Sav. Ass'n v. Bentley, 20 P. 2d 940, 945 (Cal. 1933))).

188. *See supra* notes 79–81 and accompanying text.

189. Monterey S.P. P'ship v. W.L. Bankham, Inc., 777 P.2d 623, 626 (Cal. 1989) (en banc) ("In practical effect, if not in legal parlance, a deed of trust is a lien on the property. It would be inconsistent with *Bank of Italy* to deny the beneficiaries the rights

deeds of trust have transformed since the *Stockwell* decision; although the terminology remains regarding passage of "title," the legal effect has changed such that a deed of trust only creates a lien.

Even if the California Supreme Court's language in *Monterey* was unclear—in that the lien theory also applies to deeds of trust—the *Calvo* court incorrectly gave more weight to a hundred-year-old opinion based on the abandoned title theory than the California Court of Appeal's explicit rejection of cases based on "the obsolete lien versus title theory historically relied on to differentiate the two security instruments."[190] The *Calvo* court ignored the highest authority and instead gave deference to an ancient case decided by another panel of the court of appeal.[191] Finally, because of its weak analysis, the court was unable to assert a policy reason to justify its adherence to stare decisis with regard to *Stockwell*, nor did it explain its refusal to follow California Supreme Court analysis and more recent appellate decisions to the contrary.[192] Instead, the court engaged in the same analysis as the district courts: *Stockwell* is the only case on point, therefore we are bound to follow *Stockwell*.[193] Accordingly, because

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of mortgagees . . . merely because the beneficiaries' security interest took the form of a deed of trust, which conveys 'title' to a trustee. The deed of trust conveys 'title' to the trustee 'only so far as may be necessary to the execution of the trust.'" (citations omitted) (quoting Lupertino v. Carbahal, 111 Cal. Rptr. 112, 115 (Ct. App. 1973))).

190. Aviel v. Ng, 74 Cal. Rptr. 3d 200, 206 (Ct. App. 2008) ("That theory has been discredited by the more contemporary jurisprudence . . . which functionally equates the two instruments and recognizes that a deed of trust, for all practical purposes, is a lien on the property."). The *Calvo* court held just the opposite when it reasoned that

> the court in *Bank of Italy* did not hold that a mortgage is the same as a deed of trust. Far from it; the *Bank of Italy* court recognized that the distinction between a mortgage, which creates only a lien, and a deed of trust, which passes title to the trustee, "has become well settled in our law and cannot now be disturbed."

Calvo, 130 Cal. Rptr. at 819–20 (quoting *Bank of Italy*, 20 P.2d at 944).

191. *Calvo*, 130 Cal. Rptr. 3d at 819. The court ignored the California Supreme Court's holding in *Monterey* that a deed of trust creates a lien on the property as opposed to transferring actual title. *Monterey*, 777 P.2d at 626.

192. The U.S. Supreme Court has held "that *stare decisis* is a 'principle of policy' rather than 'an inexorable command.'" Hohn v. United States, 524 U.S. 236, 251 (1998) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)); *see also* Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.").

193. *See supra* notes 150–51 and accompanying text. While it is unclear as to why the *Calvo* court so conclusively decided to follow *Stockwell* without an analysis of other

of its weak analysis, *Calvo* should have little precedential weight, and the uncertainty regarding the law of deeds of trust in California remains.[194]

4. The Reversal of Salazar *by the United States District Court for the Southern District of California*

In March 2012, the United States District Court for the Southern District of California unambiguously resolved the conflict that had arisen among the federal courts in California regarding the application of section 2932.5 by reversing and remanding the bankruptcy court's *Salazar* decision.[195] Although the court engaged in a limited analysis of the bankruptcy court's reasoning and the *Calvo* court's contrary reasoning, the district court relied on the Ninth Circuit opinion *Hayes v. County of San Diego* to essentially hold that its hands were tied.[196] "In deciding an issue of state law, when there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it."[197] Because the state appellate court already determined that

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binding California cases, including those from the state's supreme court, the court of appeal's heavy reliance on the district court cases that decided to follow *Stockwell* suggests that the *Calvo* court had not engaged in much analysis of the issue beyond that already accomplished by the district courts.

194. 20 AM. JUR. 2D *Courts* § 132 (2005) ("An appellate court should follow established precedent unless there exists a compelling and urgent reason not to do so which destroys or completely overshadows the policy or purpose which the precedent established." (citing Schilling v. Schoenle, 782 S.W.2d 630, 633 (Ky. 1990))). Although *Calvo* followed *Stockwell* as precedent, California courts had already rejected outdated cases based on the obsolete title theory. *See supra* notes 78–91 and accompanying text. *Calvo* failed to explain a compelling policy reason to justify not following the other California courts, including the state's supreme court, in adopting the modern lien theory. *See Calvo*, 130 Cal. Rptr. 3d at 819. *Calvo* also demonstrates the controversy regarding the state of the law on deeds of trust in California: Is the passage of title merely a remnant of an obsolete legal theory, or does it affect the actual passage of legal title such that there is no gap in title of the sort section 2932.5 seeks to avoid? The answer to the question is crucial to the debate. As the court noted in *In re Cruz*:

> MERS argues that the assignee beneficiary need not record its interest to prevent a gap in title. It again confuses the title to the lien of the deed of trust with title to the Property. That MERS was the beneficiary of record even though ING was the foreclosing beneficiary created a gap in title to the lien. ING was a stranger to the record before the foreclosure giving rise to suspicion that the sale was not authorized. This is the very risk that § 2932.5 was intended to safeguard.

In re Cruz, 457 B.R. 806, 818 (Bankr. S.D. Cal. 2011).

195. *In re* Salazar, 470 B.R. 557, 562 (S.D. Cal. 2012).

196. *See id.* at 561 (citing Hayes v. Cnty. of San Diego, 658 F.3d 867, 870 (9th Cir. 2011)).

197. *Hayes*, 658 F.3d at 870 (quoting Ryman v. Sears, Roebuck & Co., 505 F.3d 993, 994 (9th Cir. 2007)) (internal quotation marks omitted).

section 2932.5 did not apply to deeds of trust in *Calvo*, the district court reviewing *Salazar* was bound to follow *Calvo* unless there was convincing evidence that the California Supreme Court would not follow *Calvo*.[198]

Rather than engage in an analysis of California Supreme Court decisions discussing deeds of trust to determine whether the state's high court would follow *Calvo*'s reasoning,[199] the district court simply held that the California Supreme Court would probably follow *Calvo* because it denied the *Calvo* plaintiff's petition for review.[200] It is truly odd that the district court decided to draw an inference as to whether the California Supreme Court would follow *Calvo* based on its denial of review because the district court would have been forbidden from drawing similar conclusions based on United States Supreme Court denials of certiorari.[201] Given such questionable judicial reasoning, the California Legislature must no longer leave this issue in the hands of the courts; it must amend the foreclosure statutes to define deeds of trust in light of the modern lien theory.

VI. REVISION OF CALIFORNIA STATUTES GOVERNING DEEDS OF TRUST IS NECESSARY TO REMEDY UNCERTAINTY OF THE LAW

The uncertainty that both consumers and lenders face due to the ambiguous state of the law governing deeds of trust would be avoided if the California Legislature amended the state code to reflect the important changes that have occurred in California over the last century: (1) the

198. *Salazar*, 470 B.R. at 561–62.

199. See *supra* Part III.A for a discussion of the California Supreme Court's rejection of the outdated title theory and cases predating *Bank of Italy*, which would include *Stockwell*. Had the district court analyzed these cases, it should have come to the conclusion that *Calvo* was based on *Stockwell*, a case that has been implicitly overruled. *See supra* notes 189–90 and accompanying text.

200. *Salazar*, 470 B.R. at 561 ("To the contrary, the California Supreme Court denied the plaintiff's petition for review, which suggests it would indeed follow the Court of Appeal decision.").

201. *See* Blair C. Warner, The Hypocrisy of the Acquiescence Canon 12 (Mar. 2010) (unpublished manuscript), *available at* http://works.bepress.com/blair_warner/2 ("When it comes to the persuasiveness of the Supreme Court's own inactivity, the Court has made it clear that no weight should be given to the denial of certiorari. Justice Stevens and Justice Frankfurter stated repeatedly that the orders of the Court denying certiorari have no precedential significance at all." (citing Jeff Bleich & Deborah Pearlstein, *Dissenting from Not Deciding: Clues About What the Law Might Become—And How It Will Get There*, OR. ST. B. BULL., Dec. 2002, at 13, 16)); *see also* Missouri v. Jenkins, 515 U.S. 70, 85 (1995) ("Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" (quoting United States v. Carver, 260 U.S. 482, 490 (1923))).

rejection of the title theory in favor of the lien theory,[202] and (2) the rejection of mortgages in favor of deeds of trust.[203] Numerous states have statutory provisions that provide examples for how California could amend its code to eliminate the current ambiguity.[204] In addition, recognizing the legitimacy of MERS as a private alternative to public recording, provided that it maintains easy public access, could allow the real estate market to see the benefits of large scale deed of trust transfers while ensuring consumers the ability to monitor the status of their loans.[205] Nonetheless, solely embracing MERS as an alternative recordation system would fail to resolve the confusion that led to so much litigation regarding deeds of trust in California.[206] Therefore, amending the statutes governing deeds of trust should take precedence.

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202. Aviel v. Ng, 74 Cal. Rptr. 3d 200, 206 (Ct. App. 2008).

203. MILLER & STARR, *supra* note 10, § 10:1 ("The use of a conveyance to a trustee clothed with a power of sale offered the creditor several advantages over the mortgage so that, by the time the distinctions between the two security instruments were removed during the early part of the 20th century, the deed of trust had become the generally accepted and preferred security device in California.").

204. For examples of how other states define deeds of trust, see, for example, the state codes of Oregon and Alaska. OR. REV. STAT. § 86.715 (2011) ("A trust deed is deemed to be a mortgage on real property and is subject to all laws relating to mortgages on real property except to the extent that such laws are inconsistent with the provisions of ORS 86.705 to 86.795, in which event the provisions of ORS 86.705 to 86.795 shall control. For the purpose of applying the mortgage laws, the grantor in a trust deed is deemed the mortgagor and the beneficiary is deemed the mortgagee."); ALASKA STAT. § 34.20.110 (Supp. 2011) ("Trust Deeds Recorded as Mortgages. For the purposes of record, a deed of trust, given to secure an indebtedness, shall be treated as a mortgage of real estate, and recorded in full in the book provided for mortgages of real property. The person who makes or executes the deed of trust shall be indexed as 'mortgagor,' and the trustee and the beneficiary . . . as the 'mortgagees.'").

205. *See* Dordan, *supra* note 2, at 205–06. Whether or not large scale pooling and transferring of deeds of trust and mortgages is in fact beneficial to the economy is in dispute. *Id.* at 205 ("By electronically and cheaply recording assignments of notes, MERS does provide a service that probably somewhat lowers the cost of obtaining mortgages and makes a sale of the mortgage easier on the secondary market. Even though there has been much abuse in the secondary markets and for all its faults, the secondary market does have a positive effect of freeing up credit which can give more homeowners access to loans." (footnote omitted)). *But see* Peterson, *supra* note 105, at 1398 ("While there is plenty of blame to go around, the MERS recording and foreclosure system was an additional contributing cause of the American mortgage foreclosure crisis. MERS facilitates predatory structured finance by decreasing the exit costs of originators.").

206. *See supra* Part III.A; *see also* MILLER & STARR, *supra* note 10, § 10:1 (discussing how deeds of trust are the preferred security device in California, and yet they lack statutory definition).

A. Oregon's Code Provides Guidance in Defining and Regulating Deeds of Trust

Instead of relying on the interpretive powers of the California courts, the California Legislature could find a plausible model for redrafting its statutes governing deeds of trust in Oregon's Revised Statutes. The source of confusion in California is largely due to the enactment of amendments that failed to update the code according to changing notions favoring the lien theory over the harsh effect of the title theory of mortgages and deeds of trust.[207] The failure to update the California Civil Code led to the conflict in the federal courts as to whether the same rules that govern mortgages also govern deeds of trust in California.[208] In contrast, Oregon Revised Statutes section 86.715 explicitly recognizes that deeds of trust are deemed mortgages and governed by the same laws.[209] The statute's clear definition of a trust deed as a mortgage provides the courts guidance in that the legislative intent is clear and the courts need not rely solely on ambiguous language in cases holding that deeds of trust are in legal terminology one thing, while in *effect* only mortgages.[210]

Oregon's code also unambiguously requires the trustee to record the assignment of a deed of trust in a nonjudicial foreclosure for a valid foreclosure.[211] Although lenders and the financial industry might object

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207. The legislature, when revising the code, saw fit to simply move section 2932.5 wholesale from the section governing "Uses and Trusts" to the section governing "Mortgages" without also specifying in the provision whether or not it applied to both mortgages and deeds of trust. Section 2932.5 was originally section 858 but "succeeded to § 858 verbatim as part of the 1986 technical revisions to California trust law." *In re* Cruz, 457 B.R. 806, 815 (Bankr. S.D. Cal. 2011) (citing *Recommendation Proposing the Trust Law*, 18 CAL. L. REVISION COMMISSION REP. 1207, 1483 (1986); *Conforming Revisions*, 18 CAL. L. REVISION COMMISSION REP. 753, 764 (1985)).

208. *See supra* note 14 and accompanying text. For another way to avoid this dilemma, see also ARIZ. REV. STAT. ANN. § 33-805 (Supp. 2011): "Deeds of trust may be executed as security for the performance of a contract or contracts. Except with respect to chapter 6 of this title, statutes of this state which refer to mortgages as security instruments are deemed to also include deeds of trust, unless the context otherwise requires." *Id.*

209. *See supra* note 204.

210. *See, e.g.*, Monterey S.P. P'ship v. W.L. Bankham, Inc., 777 P.2d 623, 626 (Cal. 1989) (en banc).

211. OR. REV. STAT. § 86.735 (Supp. 2012) ("A trustee may foreclose a trust deed by advertisement and sale in the manner provided in ORS 86.740 to 86.755 if: (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated . . . ."); *see also* IDAHO CODE ANN. § 45-1505 (Supp. 2012) ("Foreclosure of trust deed, when—The trustee may foreclose a

to such a revision to California's deed of trust law, arguing that it is too favorable to borrowers who would later try to escape their obligations of repayment, Oregon's statute requiring public recordation of transfers before a valid foreclosure also allows the recording to take place until the point of foreclosure.[212] This flexibility allows lenders to correct any deficiencies, such as the lack of a recording of assignments, at any time prior to initiating the foreclosure, thereby preventing courts from finding reasons to invalidate foreclosures.[213] Therefore, if California adopted a statute similar to Oregon's, it would not overburden lenders enough to justify backlash against political leaders.

For example, *Ekerson v. Mortgage Electronic Registration System* demonstrates how Oregon's code resolves the problems in cases similar to those causing confusion in federal courts sitting in California.[214] In *Ekerson*, the court granted the plaintiff a temporary restraining order to prevent a challenged foreclosure under a deed of trust.[215] The plaintiff granted a deed of trust to Citibank.[216] The court noted that MERS became "an assignee of the original lender," and assigned the beneficial interest under the deed of trust to Citimortgage.[217] Finally, another party, Cal-Western Reconveyance, was named as the trustee in charge of the foreclosure sale, causing even greater confusion for the borrower.[218] The court found that the foreclosure violated section 86.735 of the Oregon Revised Statutes, stating "[t]he problem that defendants run into in this case is an apparent failure to record assignments necessary for the foreclosure."[219] Applying the statute's unambiguous language, the

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trust deed by advertisement and sale under this act if: (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated . . . .").

212. OR. REV. STAT. § 86.735.

213. *See* Efrati, *supra* note 16 (commenting on how the harsh effects of foreclosures on borrowers following the collapse of the real estate market has led to judicial activism, with some judges finding ways to invalidate foreclosures).

214. Ekerson v. Mortg. Elec. Registration Sys., No. 11-CV-178-HU, 2011 WL 597056, at *3 (D. Or. Feb. 11, 2011).

215. *Id.* at *1 (following the standard laid out by the U.S. Supreme Court, in that the plaintiff was (1) "likely to succeed on the merits, (2) [was] likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest." (citing Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008))); *id.* at *4 (granting temporary restraining order).

216. *Id.* at *1. That Oregon treats deeds of trust as mortgages is apparent from the court's reference to Citibank as mortgagee. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at *3. In its reasoning, the *Ekerson* court cited an earlier case, *Burgett v. Mortgage Electronic Registration System*, for its denial of the motion for summary judgment brought by the defendant—also MERS in that case—because of the "failure to

court held that the plaintiff "established MERS, who was the recorded beneficiary of the trust deed, assigned successor trustees to the trust deed but failed to record the appointment of any successor trustee as required before a nonjudicial foreclosure sale may be conducted under Oregon law."[220]

As seen above, Oregon's statutory system provides a workable example of deeds of trust that California should adopt. The Oregon code describes deeds of trust in relation to mortgages and describes the legal consequences of failing to record deeds of trust.[221] Additionally, the selected statutes are not overly burdensome on lenders because they also allow prior unrecorded assignments to be filed in connection with a foreclosure.[222] Whereas federal courts sitting in Oregon have clear statutes to guide their decisions, federal courts in California must reconstruct the history of deeds of trust in California's common law over the course of a century.[223] The need for California district courts to analyze cases dating as far back as 1908 in order to translate statutes that apply to everyday transactions demonstrates that it is time for the California Legislature to amend the statutes governing deeds of trust.

B. Another Alternative to Public Recording: Embracing MERS and the Private Recording System

Although Oregon's statutory scheme offers a possibility for revision, it would likely be met with political resistance from lenders and the finance industry. Requiring the public recordation of assignments would also fail to solve the problems of market demand for mortgage and deed of trust transfers and the expenses of recording such transfers that MERS seeks to avoid.[224] Instead of denying MERS the ability to circumvent the

record assignments necessary for the foreclosure." *Id.* (quoting Burgett v. Mortg. Elec. Registration System, No. 09 6244 HO, 2010 WL 4282105, at *3 (D. Or. Oct. 20, 2010)).

220. *Id.* at *4.

221. OR. REV. STAT. § 86.715 (2011); OR. REV. STAT. § 86.735 (Supp. 2012).

222. *See supra* notes 211–12 and accompanying text.

223. *See supra* Part V.A–B.

224. *See supra* notes 106–11 and accompanying text; *see also* McIntire, *supra* note 1 ("Although the average person has never heard of it, MERS . . . holds 60 million mortgages on American homes, through a legal maneuver that has saved banks more than $1 billion over the last decade but made life maddeningly difficult for some troubled homeowners. Created by lenders seeking to save millions of dollars on paperwork and public recording fees every time a loan changes hands, MERS is a confidential computer registry for trading mortgage loans.").

recording statutes, or reading deeds of trusts out of the statutes requiring recordation of mortgage assignments, California could adopt a "peaceful existence" approach, wherein it recognizes MERS as a private alternative to public recording as long as it maintains public access to its database.[225] Under the peaceful existence approach, the real estate market benefits from lower costs, the public has greater access to credit, and the public has access to the same information that the public recording system seeks to ensure.[226] However, the legislature still must address other considerations, such as "technical aspects of standing to foreclose, title and lien searches, and other aspects of real estate practice [that] remain to be considered in every transaction."[227]

In addition to the peaceful existence approach, the California Legislature could examine the MERS system and propose requirements that the system meet all the information-providing characteristics of the public system, thereby allowing the private system of recording to be a true alternative to the public system.[228] Any confusion resulting from dual recording systems would be minimal because an interested party would only need to check the MERS system if the information was not

225. *See* Dordan, *supra* note 2, at 206 ("A solution to MERS's transparency problem would be opening up its database to the public. The primary complaint with MERS is that it holds the information regarding the chain of title out of reach of the public." (footnote omitted)); *see also* Valenza, *supra* note 107, at 272 (using the term "peaceful existence" to describe Dordan's approach based on the title of Dordan's comment). Indeed, Delaware has already reined in MERS by requiring MERS to provide public access to accurate information regarding its mortgages. *See MERS Reaches Agreement*, *supra* note 3. Delaware's Attorney General filed suit and MERS agreed to make certain concessions ensuring that homeowners can find out accurate information from MERS when trying to save their homes from foreclosure. *Id.*

226. Although courts do not agree whether the recording system is meant to provide notice to only purchasers and mortgagees or to borrowers as well, both groups are part of the public that benefits from the public recording system. *See In re* Salazar, 448 B.R. 814, 821 (Bankr. S.D. Cal. 2011) (discussing how statutes requiring public recording of deed of trust transfers protect borrowers by providing them information about their loans), *rev'd*, 470 B.R. 557 (S.D. Cal. 2012). *But see* Pedersen v. Greenpoint Mortg. Funding, Inc., CIV No. S-11-0642 KJM EFB, 2011 WL 3818560, at *18 (E.D. Cal. Aug, 29, 2011) (holding that public recording statutes are meant to provide notice to purchasers of loans and mortgagees, but not to borrowers). For a discussion of the benefits that MERS's system would provide to the public and the real estate market, see Dordan, *supra* note 2, which notes that "[b]y electronically and cheaply recording assignments of notes, MERS does provide a service that probably somewhat lowers the cost of obtaining mortgages and makes a sale of the mortgage easier on the secondary market." *Id.* at 205 Dordan explains that this secondary market frees up credit, giving more homeowners access to loans. *Id.*

227. Valenza, *supra* note 107, at 273.

228. *See* Dordan, *supra* note 2, at 206 (recommending ways for MERS to be used to benefit the public).

available in the public records office.[229] The viability of a private system would require the California Legislature to draft statutes that lay out the requirements of the private system such that it would account for the needs of both consumers—such as readily available information on the parties that hold an interest in their loan and the power to foreclose—and prospective purchasers and mortgagees.[230]

C. Revising the Statutory Scheme Governing Deeds of Trust Must Take Precedence over Embracing Private Recording

Although legislative approval of private recording systems that allow easy public access may provide benefits to consumers and lenders, such a solution should not take precedence over revising the statutory scheme governing deeds of trust in California. Even if MERS were recognized as a legitimate alternative to public recording, the California Civil Code would remain unclear as to whether any recording of a deed of trust assignment is required for a valid foreclosure.[231] Admittedly, the potential for litigation is reduced with public access to systems like MERS,[232] but lenders and financial institutions could continue to assign deeds of trust without MERS's involvement. Furthermore, California courts continue to dispute which provisions governing mortgages also apply to deeds of trust.[233]

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229. *See* Valenza, *supra* note 107, at 260 (discussing how MERS claims to efficiently track mortgage transfers in its system). Another option, instead of having the private system alongside the public system, would be to leave it to the state legislatures to amend the recording process to keep up with the multitude of mortgage and deed of trust transfers, but such a solution may only lead to further confusion. *See* Dordan, *supra* note 2, at 206 ("Perhaps states and localities could come up with simpler ways to record assignments that may be less cumbersome and give some of the benefits of MERS, but these would still be uneven systems with different localities having different recording systems.").

230. *See supra* notes 202–06 and accompanying text.

231. The legislature's recognition of MERS would allow the use of the MERS recording system as an alternative to the public recording system, but courts would still be without guidance as to whether the recording of an assignment of a deed of trust, through a private system or a public system, is even required for a valid foreclosure. Although the majority of deed of trust assignments in California are recorded in the MERS system, there is still a substantial portion that are not. *See* Dordan, *supra* note 2, at 177 (discussing how MERS is "listed as the mortgagee of record on approximately two out of three newly originated residential mortgages nationwide").

232. *See id.* at 206.

233. *See supra* Part III.A.

Thus, simply recognizing MERS as a valid alternative to public recording would fail to solve the root of the problem—deeds of trust have overtaken mortgages as the preferred security device in California, yet they lack a statutory definition.[234] The California Legislature saw the need to define mortgages and provide a statutory scheme to govern them.[235] Therefore, it is necessary that the legislature fulfill its duty to keep the laws current and amend those provisions to reflect the modern lien theory and the pervasive use of deeds of trust instead of mortgages.[236]

The legislature should adopt a provision similar to those found in Arizona, Alaska, and Oregon that provide that deeds of trust are governed by the same laws that govern mortgages, except where they conflict with other statutes specifically governing the use of deeds of trust.[237] In addition, the California Legislature should amend section 2932.5 to expressly cover deeds of trust in order to provide consumers with information regarding the status of their loan, avoid gaps in title, and allow lenders to avoid unnecessary foreclosure challenges.[238] Finally, only after such revisions are made should the legislature consider allowing the use of private alternatives to public recording to benefit the economy and the public.

VII. CONCLUSION

The drastic rise in home foreclosures created a chaotic scenario for courts faced with home foreclosures and bankruptcies, a chaotic scenario that was only aggravated by the ambiguity of the California Civil Code provisions that govern deeds of trust.[239] Courts, as well as the authors of leading treatises in the field, cannot agree whether or not section 2932.5 applies to both mortgages and deeds of trust.[240] The cause of this ambiguity is largely due to the fact that deeds of trust are not statutorily defined—they are only referred to peripherally in the code provisions that discuss mortgages.[241] The state of the law is perplexing, considering that deeds

234. MILLER & STARR, *supra* note 10, § 10:1.
235. CAL. CIV. CODE §§ 2920–2967 (West 2012).
236. *See* Aviel v. Ng, 74 Cal. Rptr. 3d 200, 206 (Ct. App. 2008) ("[The title] theory [of mortgages] has been discredited by the more contemporary jurisprudence discussed above, which functionally equates the two instruments and recognizes that a deed of trust, for all practical purposes, is a lien on the property."); *see also* Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815, 821 (Ct. App. 2011) (discussing how deeds of trust have overtaken mortgages as the preferred real estate security devices in California and how statutes governing mortgages have become practically obsolete).
237. *See supra* notes 204, 208, 211.
238. Idaho and Oregon provide examples of how section 2932.5 could be amended to include deeds of trust. *See supra* note 211.
239. *See supra* Part II.B.
240. *See supra* Parts III.B, V.
241. *See supra* note 28.

of trust are the preferred security device for real estate in California, and mortgages are rarely used.[242] Therefore, the California Legislature should, at the very least, statutorily define deeds of trust, much like Alaska, Arizona, and Oregon.[243] Given the changes in how the California Supreme Court has interpreted deeds of trust in the past century, these statutory definitions should account for California's rejection of the title theory of deeds of trust, finally putting to rest an aged California "anomaly" that is "obsolete."[244] Because California courts apply similar rules to deeds of trust and mortgages,[245] it only makes sense to specify in the code that the same rules apply unless they conflict. Furthermore, the California Legislature should follow the example of Oregon and Idaho and include the term *deed of trust* in the statutes that mention mortgages, such as the recordation statutes, where confusion could easily be avoided.[246]

However, these revisions may fail to account for the market demand for high-volume mortgage and deed of trust transfers, the demand that MERS was formed to meet.[247] The legislature should conduct a study on whether these high-volume transfers are a form of commerce it should endorse, or at the very least allow.[248] The legislature should then consider allowing the private system of recording as a valid alternative to the public system where private recording complies with certain requirements the legislature would set forth in legislative amendments to protect both lenders and borrowers.[249] But the focus on such a study should only come after the legislature makes revisions clarifying the statutory scheme and should not take precedence over the need to statutorily define deeds of trust in California.

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242. *See supra* Part II.A; *see also* Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815, 821 (Ct. App. 2011).

243. *See* ALASKA STAT. § 34.20.110 (2010); ARIZ. REV. STAT. ANN. § 33-805 (2007); OR. REV. STAT. § 86.715 (2011); *supra* Part VI.A.

244. Bank of It. Nat'l Trust & Sav. Ass'n v. Bentley, 20 P.2d 940, 945 (Cal. 1933) (describing the historical nature of deeds of trust in California as "anomalous"); Aviel v. Ng, 74 Cal. Rptr. 3d 200, 206 (Ct. App. 2008) (describing the title theory as "obsolete").

245. With the exception of the recent *Calvo* decision that based its adherence to the old title theory on the reasoning in *Stockwell*. *See supra* Part V.C.3.

246. *See supra* note 211.

247. *See supra* notes 106–11.

248. *See* Peterson, *supra* note 105, at 1398 (identifying several MERS-related factors that have enabled predatory lending and may have contributed to the mortgage foreclosure crisis).

249. *See supra* notes 158–62 and accompanying text.

The legislature must fulfill its lawmaking function and recognize that its outdated, ambiguous laws create confusion for the courts.[250] It is a great disservice to homeowners who suffer from uncertainty when faced with losing their homes for the California Legislature to allow deeds of trust to remain undefined and to leave the California Civil Code reflecting an understanding of deeds of trust based on the title theory that became obsolete decades ago.

250. *See supra* Part V.